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(16,919.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 334.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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1 *Caption.*

THE STATE OF TEXAS, }
County of Travis. }

At a term of the district court of the 26th judicial district of Texas, begun and holden at Austin, within and for the county of Travis, before the Honorable R. E. Brooks, and ending on the 26th day of June, 1897, the following case came on for trial, to wit:

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

Plaintiff's First Amended Original Petition.

Filed May 12th, 1897.

In District Court, Travis County, Texas, 26th Judicial District.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL.

Comes now the plaintiff, and by leave of the court amends the original petition filed herein Feb'y 5th, 1896, and in lieu thereof files the following:

The State of Texas, acting by and through its attorney general, M. M. Crane, hereinafter styled plaintiff, complaining of the Waters-Pierce Oil Company, E. T. Hathaway, William Grice, F. A. Austin, J. W Keenan, and Lewis Fries, hereinafter styled defendants,

2 respectfully represents:

1. That the State of Texas, acting by and through its attorney general, is the plaintiff herein.

2. That the Waters-Pierce Oil Company, E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries are defendants herein.

3. That the Waters-Pierce Oil Company is a private corporation duly and legally incorporated under the laws of the State of Missouri, and that its principal offices are situated in the city of St. Louis, in the State of Missouri, with the following officers: Henry Clay Pierce, president; Arthur M. Finlay, vice-president; N. M. Adams, treasurer; J. P. Gruet, secretary, and E. Willis, auditor; that, as shown by its articles of incorporation, the objects for which said company was formed are dealing in naval stores and dealing in and compounding petroleum and other oils and all the products thereof, and buying and selling the same in the State of Missouri and other States; that the capital stock of said corporation was originally the sum of one hundred thousand dollars, but that the amount of same was, in accordance with the laws of said State of Missouri, on, to wit, the 20th day of June, 1882, increased to the sum of four hundred thousand dollars.

4. That on, to wit, July 6th, 1889, said Waters-Pierce Oil Company filed in the secretary of state's office of this State, in accordance with the requirements of law, a certified copy of its articles of incorporation, and secured a permit to transact business, as stated in its said articles of incorporation, in this State for the term of ten years from said date.

5. That since said date said corporation has been, under and by virtue of said permit, transacting business in this State; that for the purpose of transacting said business it has, in pursuance of its policy and purposes hereinafter to be stated, and in pursuance of the policy, objects, and purposes of the unlawful combinations and trusts
3 hereinafter to be named and described, subdivided the State of Texas into five grand divisions, in which to sell the oils of the Waters-Pierce Oil Company and carry out its purposes and the purposes and objects of the unlawful combinations and trusts to be hereinafter mentioned, and has appointed an agent for each grand division, and has also appointed many local agents for the various towns, cities, and counties in this State; that the defendant E. T. Hathaway, a resident of the city of Denison, Grayson county, Texas, is and has been for many years the general manager of said Waters-Pierce Oil Company for the North Texas division; that the defendant F. A. Austin, a resident of the city of Marshall, Harrison county, Texas, is the manager of Waters-Pierce Oil Company for the East Texas division; that the defendant William Grice, a resident of the city of Dallas, Dallas county, Texas, is the manager of the Waters-Pierce Oil Company for the Central Texas division; that the defendant J. W. Keenan, a resident of Galveston, Galveston county, Texas, is the acting manager of said company for the Southern Texas division; that the defendant Lewis Fries, a resident of the city of San Antonio, Bexar county, Texas, is the manager of said company for the Western Texas division; that one W. B. Abadie, a resident of Travis county, Texas, is the local agent for said company at the city of Austin, in Travis county, Texas.

6. That heretofore, to wit, on or about the 2nd day of January, 1882, and again on or about the 4th day of said month a great many firms, partnerships, individuals, and corporations, the said firms, partnerships, individuals, and corporations being stated in the instruments of writing hereinafter set out, and owning and controlling a large amount of the money and capital invested in the production of petroleum and its products and in the production, manufacture, and sale and shipment of said products, and the means and instrumentalities employed in such industries, met at some place in the United States, to your petitioner unknown, and made, entered into, and executed the following unlawful agreements, combinations, and trusts, to wit:

4 "This agreement, made and entered upon this second day of January, A. D. 1882, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth:

I. It is intended that the parties to this agreement shall embrace three classes, to wit:

1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Company, Elizabethport acid works, Imperial Refining Company, Limited; Chas. Pratt & Co., Paine Ablett & Co., Limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburg); Smith's Ferry Oil Trans. Company, Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited.

Also, all stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2nd. The following individuals, to wit:

W. C. Andrews, Jno. D. Archbold, Lide K. Arter, J. A. Bostwick, Benj. Brewster, D. Bushnell, Thos. C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, H. M. Harma, and Geo. W. Chapin, D. M. Harkness, trustee, S. V. Harkness, John Huntington, H. A. Hutchins, Chas. F. G. Heye, O. B. Jennings, Chas. Lockhart, A. M. McGregor, Wm. H. Macy, Wm. H. Macy, Jr., estate of Josiah Macy, Jr., Wm. H. Macy, Jr., executor, O. H. Payne, O. H. Payne, trustee, Chas. Pratt, Horace A. Pratt, C. M. Pratt, A. J. Pouch, John D. Rockefeller, Wm. Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandegrift, William T. Wardwell, W. G. Warden, Jos. L. Warden, Frew & Co., Louis C. Wheaton, Julia H. York, Geo. H. Vilas, M. R. Keath, Geo. F. Chester, trustee.

Also, all such individuals as may hereafter join in this
5 agreement at the request of the trustees herein provided for.

3rd. A portion of the stockholders and members of the following corporations and limited partnerships, to wit:

American Lubricating Oil Company, Baltimore United Oil Company, Beacon Oil Co., Bush & Denslow Manufacturing Co., Central Refining Co., of Pittsburg; Chesebrough Manufacturing Company, Chess-Carley Co., Consolidated Tank Line Co., Inland Oil Co., Keystone Refining Co., Maverick Oil Co., National Transit Co., Portland Kerosene Oil Co., Producers' Consolidated Land and Petroleum Co., Signal Oil Works, Limited; Thompson & Bedford Co., Limited; Devoe Manufacturing Co., Eclipse Lubricating Oil Co., Limited; Empire Refining Co., Limited; Franklin Pipe Co., Limited; Galena Oil Works, Limited; Galena Farm Oil Co., Limited; Germania Mining Co., Vacuum Oil Co., H. C. Tan Vine & Co., Limited; Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows:

(1.) As soon as practicable, a corporation shall be formed in each

of the following States, under the laws thereof, to wit: Ohio, New York, Pennsylvania and New Jersey; provided however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

(2.) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products, and all the materials used in such business, and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter, or, if necessary
6 to comply with the law, the powers aforesaid may be restricted and reduced.

(3.) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other States and Territories.

(4.) Each of said corporations shall be known as the Standard Oil Company of —— (and here shall follow the name of the State or Territory by virtue of the laws of which said corporation is organized).

(5.) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

(6.) The shares of stock of each of said corporations shall be issued only for money, property or assets equal at a fair valuation to the par value of the stock delivered therefor.

(7.) All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the several Standard Oil Companies. All of the property, assets and business in, or of each particular State shall be transferred to and vested in the Standard Oil Company of that particular State, and in order to accomplish such purpose, the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first, are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement), to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or Companies of the proper State or States, as soon as said corporations are organized and ready to receive the same, all the
7 property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of such property, assets and business shall accompany each transfer.

(8.) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all the property, real and personal, assets and business mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company or Companies, of the proper State or States, as soon as the said corporations are organized and ready to receive the same.

(9.) The parties embraced in class third of this agreement do

covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named, to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks or any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper State, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the value of the money, property and business assigned, to be held in place of the stocks of the company or companies assigning such property.

(10.) The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so trans-
8 ferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of said companies shall ever be issued except for money, property or business equal at least to the par value of the stock so issued, nor shall any stock be issued by any of said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

(11.) The consideration for any stocks delivered to said trustees as above provided for, as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Company so received by said trustees, and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

III. The trusts upon which said stocks shall be held, and
9 the number, powers and duties of said trustees, shall be as follows:

(1.) The number of trustees shall be nine.

(2.) J. D. Rockefeller, O. H. Payne and Wm. Rockefeller are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1885.

(3.) J. A. Bostwick, H. M. Flagler and W. G. Warden are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1884.

(4.) Chas. Pratt, Benj. Brewster and Jno. D. Archbold are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1883.

(5.) Elections for trustees to succeed those herein appointed shall be held annually, at which election a sufficient number of trustees shall be elected to fill all vacancies occurring either from expiration of the term of the office of trustee, or from any other cause. All trustees shall be elected to hold their office for three years, except those elected to fill a vacancy arising from any cause, except expiration of term, who shall be elected for the balance of the term of the trustee whose place they are elected to fill. Every trustee shall hold his office until his successor is elected.

(6.) Trustees shall be elected by ballot by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates, who may be registered as such on the books of the trustee, may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names, but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books may be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such election shall elect.

(7.) The annual meeting of the owners of said trust certifi-
10 cates for the election of trustees, and for other business, shall be held at the office of the trustees, in the city of New York, on the first Wednesday of April of each year, unless the place of meeting be changed by the trustees, and said meeting may be adjourned from day to day until its business is completed. Special meetings of the owners of said trust certificates may be called by the majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of holders of trust certificates whenever requested to do so by a petition signed by the holders of ten per cent. in value of such certificates. The business of such special meetings shall be confined to the object specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given, by personal notice as far as possible, and by public notice in one of the principal newspapers of each State, in which a Standard Oil Company exists, at least ten days before such meeting. At any meeting a majority in value of the holders of trust certificates represented consenting thereto, by-laws may be made, amended and

repealed, relative to the mode of election of trustees and other business of the holders of trust certificates, provided, however, that said by-laws shall be in conformity with this agreement. By-laws may also be made, amended and repealed at any meeting, by and with the consent of a majority in value of the holders of trust certificates, which alter this agreement relative to the number, powers and duties of the trustees, and to other matters tending to the more efficient accomplishment of the objects for which the trust is created, provided only that the essential intents and purposes of this agreement be not thereby changed.

(8.) Whenever a vacancy occurs in the board of trustees more than sixty days prior to the annual meeting for the election of trustees, it shall be the duty of the remaining trustees to call a
11 meeting of the owners of Standard Oil trust certificates for the purpose of electing a trustee or trustees to fill the vacancy or vacancies. If any vacancy occurs in the board of trustees, from any cause, within sixty days of the date of the annual meeting for the election of trustees, the vacancy may be filled by a majority of the remaining trustees, or, at their option, may remain vacant until the annual election.

(9.) If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill any vacancy or vacancies in said board of trustees, the trustee or trustees so appointed shall hold his or the respective office or offices only until a successor or successors shall be elected in the manner above provided for.

(10.) Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable, it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee or the administrator or executor of any deceased trustee to make said transfer.

(11.) The trustees shall prepare certificates which shall allow the interest of each beneficiary in said trust, and deliver them to the persons properly entitled thereto. They shall be divided into shares of the par value of one hundred dollars each, and shall be known as Standard Oil trust certificates, and shall be issued subject to all the terms and conditions of this agreement. The trustees shall have power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be signed, attested and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement and by the by-laws herein provided for.

12 (12.) No certificates shall be issued except for stocks and bonds held in trust, as herein provided for, and the par value of certificates issued by said trustees shall be equal to the par value of the stocks of said Standard Oil Companies, and the appraised value of other bonds and stocks held in trust. The various bonds, stocks and moneys held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the

evidence of the interest held by the several parties in this trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificate or certificates for cancellation, or upon satisfactory proof of the loss thereof, and in the latter case they shall require a sufficient bond of indemnity.

(13.) The stocks of the various Standard Oil Companies held in trust by said trustees, shall not be sold, assigned or transferred by said trustees, or by the beneficiaries, or by both combined, so long as this trust endures. The stocks and bonds of other corporations, held by said trustees, may be by them exchanged or sold and the proceeds thereof distributed *pro rata* to the holders of trust certificates, or said proceeds may be held and reinvested by said trustees for the purposes and uses of the trust; provided, however, that said trustees may, from time to time, assign such shares of stock of said Standard Oil Companies as may be necessary to qualify any person or persons chosen or to be chosen as directors and officers of any of said Standard Oil Companies.

(14.) It shall be the duty of said trustees to receive and safely keep all interest and dividends declared and paid upon any of the said bonds, stocks and moneys held by them in trust, and to distribute all moneys received from such sources or from sales of trust property or otherwise by declaring and paying dividends upon the Standard trust certificates as funds accumulate, which, in their judgment, are not needed for the uses and expenses of said
13 trust. The trustees shall, however, keep separate accounts of receipts from interest and dividends, and of receipts from sales or transfers of trust property, and in making any distribution of trust funds, in which moneys derived from sales or transfers shall be included, shall render the holders of trust certificates a statement showing what amount of the fund distributed has been derived from such sales or transfers. The said trustee may be also authorized and empowered by a vote of a majority in value of holders of trust certificates, whenever stocks or bonds have accumulated in their hands from money purchases thereof, or the stock or bonds held by them have increased in value, or stock dividends shall have been declared by any of the companies whose stocks are held by said trustees or whenever from any such cause it is deemed advisable to so do, to increase the amount of trust certificates to the extent of such increase or accumulation of values, and to divide the same among the persons then owning trust certificates *pro rata*.

(15.) It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships, any portion of whose stock is held in said trust. It shall be their duty as stockholders of said companies to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates.

(16.) All the powers of the trustees may be exercised by a majority

of their number. They may appoint from their own number an executive and other committees. A majority of each committee shall exercise all the powers which the trustees may confer upon such committee.

(17.) The trustees may employ and pay all such agents
14 and attorneys as they deem necessary in the management of said trust.

(18.) Each trustee shall be entitled to a salary for his services not exceeding twenty-five thousand dollars per annum, except the president of the board, who may be voted a salary not exceeding thirty thousand dollars per annum, which salaries shall be fixed by said board of trustees. All salaries and expenses connected with or growing out of the trust shall be paid by the trustees from the trust fund.

(19.) The board of trustees shall have its principal office in the city of New York, unless changed by vote of the trustees, at which office or in some place of safe deposit in said city, the bonds and stocks shall be kept. The trustees shall have power to adopt rules and regulations pertaining to the meetings of the board, the election of officers and the management of the trust.

(20.) The trustees shall render at each annual meeting a statement of the affairs of the trust. If a termination of the trust be agreed upon as hereinafter provided, or within a reasonable time prior to its termination by lapse of time, the trustees shall furnish to the holders of the trust certificates a true and perfect inventory and appraisement of all stocks and other property held in trust, and a statement of the financial affairs of the various companies whose stocks are held in trust.

(21.) This trust shall continue during the lives of the survivors and survivor of the trustees in this agreement named, and for twenty-one years thereafter, provided, however, that if at any time after the expiration of ten years two-thirds of all the holders in value, or if after the expiration of one year, ninety per cent. of all the holders in value of trust certificates shall, at a meeting of holders of trust certificates called for that purpose, vote to terminate this trust at some time to be by them then and there fixed the said trust shall terminate at the date so fixed. If the holders of trust certificates shall vote to terminate the trust as
15 aforesaid, they may, at the same meeting or at a subsequent meeting called for that purpose, decide by a vote of two-thirds in value of their number the mode in which the affairs of the trust shall be wound up, and whether the trust property shall be distributed or whether it shall be sold and the values thereof distributed, or whether part, and if so, what part, shall be divided and what part shall be sold, and whether such sales shall be public or private. The trustees, who shall continue to hold their office for that purpose, shall make the distribution in the mode directed, or, if no mode be agreed upon by two-thirds in value as aforesaid, the trustees shall make distributions of the trust property according to law. But said distribution, however made, and whether it be of property, or values, or of both, shall be just and equitable, and

such as to insure to each owner of a trust certificate his due proportion of the trust property or the value thereof.

(22.) If the trust shall be determinated by expiration of the time for which it is created, the distribution of the trust property shall be directed and made in the mode above provided.

(23.) This agreement, together with the registry of certificates books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees."

The second agreement being as follows:

"Whereas, in and by an agreement dated January 2nd, 1882, and known as the Standard trust agreement, the parties thereto did mutually covenant and agree, *inter alia*, as follows, to wit: That corporations, to be known as Standard Oil Companies, of various States, should be formed, and that all of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first of said agreement should be transferred to and vested in the said several Standard Oil Companies; that all of the property, assets,
16 and business in or of each particular State should be transferred to and vested in the Standard Oil Company of that particular State, and the directors and managers of each and all of the several corporations and associations mentioned in class first were authorized and directed to sell, assign, transfer and convey and make over to the Standard Oil Company or Companies of the proper State or States, as soon as said corporations were organized and ready to receive the same, all the property, real and personal, assets and business of said corporations or associations; and, whereas, it is not deemed expedient that all of the companies and associations mentioned should transfer their property to the said Standard Oil Companies at the present time, and in case of some companies and associations it may never be deemed expedient that the said transfer should be made, and said companies and associations go out of existence; and, whereas, it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer or transfers should take place, if at all.

"Now, it is hereby mutually agreed between the parties to the said trust agreement, and as supplementary thereto, that the trustees named in the said agreement, and their successors, shall have the power and authority to decide what companies shall convey their said property as in said agreement contemplated, and when the said sales and transfers shall take place, if at all, and until said trustees shall so decide each of said companies shall remain in existence and retain its property and business, and the trustees shall hold the stocks thereof in trust, as in said agreement provided. In the exercise of said discretion the trustees shall act by a majority of their number, as provided in said trust agreement. All portions of said trust agreement relating to this subject shall be considered so changed as to be in harmony with this supplemental agreement.

"In witness whereof, the said parties have subscribed this agreement, this 4th day of January, 1882."

17 7. Plaintiff further avers that the real object, purpose, and intent of the firms, partnerships, individuals, and corporations in making and entering into said agreement and trust was and is to control and monopolize the petroleum industry in the United States and the several States thereof, and to monopolize and control the business of manufacturing, refining, selling, and transporting petroleum and its products, refined oils, illuminating oils, and lubricating oils, in the several States of the United States; that by said agreement said firms, individuals, partnerships, corporations, and companies therein mentioned intended to and did create, make, and effect a combination of their capital, skill, and acts for the purpose of monopolizing and controlling the petroleum industry in the several States of the United States and the business of selling and dealing in petroleum and its products, refined, lubricating, and illuminating oils, in the domestic trade of the various States of said United States; that by said agreement the said parties thereto intended and did make and effect a combination of their capital, skill, and acts for the following purposes, in addition to the purposes named, to wit:

1st. To create and carry out restrictions in trade in petroleum and its products, refined, illuminating, and lubricating oil, in the United States, and in the domestic trade of the States thereof.

2nd. To increase the price of petroleum and its products, same being commercial commodities and of prime necessity to the people.

3rd. To prevent competition in the manufacture, sale, and purchase of petroleum and its products.

4th. To fix at a standard figure the price of petroleum and its products, whereby the price of same to the public shall be controlled and established, petroleum and its products being commodities of merchandise, intended for use and sale in the State of

18 Texas as well as other States.

5th. For the purpose of agreeing, obligating, and binding themselves not to sell, dispose of, or transport petroleum and its said products below a common standard figure, and to keep the price of petroleum and its products at a fixed or graded figure, and establish and settle the price of petroleum and its products between themselves and others, and to preclude a free and unrestricted competition among themselves and others in the sale of petroleum and its products, and for the purpose of pooling, combining, and uniting any interest they should and did have in connection with the sale of petroleum and its products, that the prices of same might be affected.

7½. Plaintiff avers that the parties to said agreements intended by said agreement and did thereby create and effect a combination of their capital, skill, and acts to effectuate and carry out the above-named purposes in reference to petroleum and its products in the domestic trade and commerce in the State of Texas in said articles or commodities; that petroleum and the products thereof, espe-

cially refined oils, illuminating oils, and lubricating oils, are commodities and articles of commerce and of prime necessity to the people of this State, and generally used by them.

8. Plaintiff further avers that the nine persons who were appointed and named as trustees in and under the provisions of said trust agreements accepted their several positions and entered upon the discharge of the trust duties therein mentioned; that some of said trustees and others, to the number of nine, whose names are unknown to plaintiff, have been reappointed and appointed at various times since the execution of said trust agreements, so that nine trustees have been ever since then and still are acting thereunder, and each and all of said trustees have been and are non-residents of the State of Texas; that the offices and prin-
19 cipal place of business of said trustees have been ever since the execution of said trust agreements and still are in the city of New York, and the elections of said trustees and business transacted at their meetings by them have been had and done in said city of New York.

9. That since the date of said trust agreements and up to the present time the parties thereto, as above shown, have carried out, observed, and performed, and are still carrying out, observing, and performing, its stipulations, contracts, and agreements and the objects and purposes of same as above stated; that to facilitate the performance of the stipulations of said agreements and to aid in carrying out and accomplishing the unlawful purposes above set out and stated, the markets in the United States for the sale of petroleum and its products have been divided by the trustees appointed by and under said agreements into various subdivisions, and the territory embraced in each of said subdivisions allotted to some members or member of said trust agreement, with exclusive right and privilege to sell and deal in petroleum and its products therein; that one of such subdivisions designated and established as aforesaid includes the following territory in the United States, to wit, southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory, and a part of Louisiana; that one of the means used by the parties to said trust agreements to carry out and accomplish the unlawful purposes above mentioned of their said unlawful trust or combination is that whenever in any part of the subdivision allotted to either of said parties as aforesaid any individual or corporation not a member of or acting under and in accordance with said trust agreements brought or shipped any of the products of petroleum into said subdivision, or sold or attempted to sell any of such products therein in competition with the members of said trust aforesaid, the party to said trust agreement doing busi-
ness in such subdivisions would immediately cut the prices
20 of such products in the particular locality where competition existed, far below the market price of such products and below the reasonable cost of same, and refuse to sell to any one buying the competitive products, so that the individual or corporation selling such products in such subdivision and to merchants or other person buying same from such individual or corporation would be

compelled to sell same, if at all, at a loss, and said party would keep the prices so cut as aforesaid until the parties dealing in such competitive products were driven out of the markets in said subdivision and the merchant or dealer buying same ceased to attempt to deal therein, and then, when by such means competition in said subdivision was stifled and driven out, the member of and party to said trust agreement would immediately raise the price of such products above the fair market price of same; that the member of and party to said trust agreement is enabled to pursue the above tactics successfully and thus drive out and throttle competition by means of the assistance and the indemnity from loss assured by the combined power and wealth of all the parties to said trust agreement.

10. Plaintiff avers that, in violation of law and in abuse of its corporate powers and in the exercise of privileges, rights, and franchises not conferred upon it, defendant The Waters-Pierce Oil Company became a party to said trust agreement, and since the 6th day of July, 1889, has in the State of Texas, by and through the other defendants above named and numerous local agents in this State, diligently observed, performed, and carried out the purposes, objects, and policies of said agreement, as above shown. Plaintiff avers that said defendant The Waters-Pierce Oil Company's mode of dealing in the products of petroleum, to wit, refined oils, illuminating oils, and lubricating oils, in this State is as follows: Said company has established in various localities in this State warehouses, tanks, and other depositories and places for the storage and reception of its oils. Said company ships its oils into this
21 State, consigned to its managers and other agents, and said oils are stored in the receptacles from which they are sold in said State to merchants and others dealing therein by such managers and agents in such quantities as the buyer desires to purchase. The exact time at which said Waters-Pierce Oil Company became a party to and began acting in pursuance of said trust agreement, and began carrying out, observing, and performing its purposes and objects, as above shown, plaintiff is unable to state, but plaintiff alleges that since the date of said defendant's said permit to do business in this State it has observed, performed, and carried out said trust agreement and the purpose, policies, and objects, as above shown; that said defendant so entered into and became a party to and carried out and observed and performed the same, and is still doing so, as follows, to wit: A sufficient number of the owners and holders of its capital stock to control the corporate acts of said company, including some of its officers and directors, entered into said agreement without attaching the corporate name and seal of said defendant thereto, and the official designation of its officers; that prior to such action by said owners of defendant's capital stock defendant's capital stock consisted of a great number of chares, the exact number of which and the amount of each share plaintiff is unable to state, and upon the entering into said agreement in the manner aforesaid the shares of stock of said defendant company belonging to the persons who entered into said agreement in manner above set out (in what proportion, however, plaintiff is unable to state) were

transferred by defendant's transferring officers upon defendant's stock books to the certain nine trustees who have been appointed and named in accordance with the provisions of said trust agreements upon the request of the respective owners of said shares and in pursuance of said trust agreements. Plaintiff avers that the number and amount of said shares and the names of the owners of same so transferred to said trustees as aforesaid, and the times
22 when same were respectively transferred, and the number and amount of said shares now held by said trustees is unknown to plaintiff, but said facts appear on the books of said defendant company, and defendant is notified to produce said books or certified copies from same showing the above facts on the trial of this case, or secondary evidence will be introduced of said facts on the trial of this case. Plaintiff avers that, in lieu of the transfer of said shares as aforesaid to said nine trustees, certificates of said Standard Oil trust, which are provided for and described in said trust agreements, equal to the appraised value of the stocks of said defendant company delivered to said trustees, as aforesaid, *was* issued and delivered by said nine trustees to the persons aforesaid from whom said nine trustees had received shares of stock in defendant company. The appraised value of said stocks so transferred to said trustee, as aforesaid, was determined in the manner set forth in said agreement. Plaintiff charges further that said trustees have, in addition to the mode above stated, under the power given them in said trust agreements, purchased other stock and bonds of said Waters-Pierce Oil Company and now hold the same, in addition to the stock so transferred to them as aforesaid. Plaintiff alleges that it does not know the number and value and amount of said stock and bonds so purchased by said nine trustees, but that same is known to said defendant and appears on its books, and defendant is notified to produce said books or copies from same showing such facts on the trial of this case, or secondary evidence will be introduced of such facts. Plaintiff avers that the capital stock of said Waters-Pierce Oil Company is $400,000, and the said trustees before mentioned still hold and control the shares of stock thereof which were transferred to and purchased by them as aforesaid; that the number, amount, and value of the shares of stock of defendant Waters-Pierce Oil Company transferred to and purchased and held by said trustees, as aforesaid, is and has been sufficient to enable said trustees to
23 exercise a supervising and controlling authority and power over the affairs of said Waters-Pierce Oil Company and the management, conduct, and control of its business; that by virtue of so holding and controlling said shares the said nine trustees, acting under said trust agreements, have since July 6th, 1889, and still are able to and do control the action of defendant in the selection of its officers and directors and in the conduct and management of its business in this and other States; that defendant, said Waters-Pierce Oil Company, has never taken any corporate action or made any complaint against the said stockholders or its directors and officers signing said trust agreements, nor against its said stockholders or

officers surrendering or selling their stock in said defendant company to said nine trustees, nor against its stockholders or officers or directors receiving the Standard Oil certificates which were issued and delivered to them as aforesaid by said nine trustees in exchange for the shares of said defendant's stock, nor against any of the acts herein recited, and that none of the officers, directors, or stockholders of defendant company have at any time objected to or made complaint against such surrender and exchange of stock or against any of said recited acts, and, on the contrary, defendant, in its corporate capacity and through its officers and stockholders, has, ever since the acts in question, acquiesced in such transfer and exchange and in the control and supervision of the election of its officers and the conduct and management of its business exercised by said nine trustees; that the directors of defendant's company, either directly or through their employés, manage the business of said defendant's company so as not to conflict with the policy fixed from time to time by the nine trustees as aforesaid, and that the net earnings of defendant company have been ever since the time its stockholders entered into said trust agreements as aforesaid and still are from time to time declared and paid out as dividends upon its
24 capital stock; that the nine trustees appointed under said agreements as aforesaid have received the proportion of such dividends which were properly distributable and payable upon the stock held by said nine trustees in defendant company; that there are a large number of other corporations and companies (plaintiff being unable to ascertain the exact number) in the United States, whose stock is held and directors elected and whose affairs and business and dividends are conducted and paid under and pursuant to the provisions of the said trust agreements in a manner and to an extent similar to that herein described in respect to defendant, and from the dividends so accumulated in the hands of said nine trustees dividends are from time to time, as the interests of the trust justify, declared and paid out by said nine trustees to the holders of the Standard Oil trust certificates which have been issued by them, so that the holders of the shares of said Standard Oil certificates which were received in lieu of the number of shares of defendant's stock transferred in manner as aforesaid to said nine trustees do not receive the dividends which are payable from the earnings of defendant's company, but receive the dividends only from the accumulated earnings aforesaid which are derived from the various similar companies aforesaid and held and distributed as aforesaid by said nine trustees. Plaintiff further avers that said Waters-Pierce Oil Company, through its directors, officers, and agents, conforms its corporate action to the policy fixed by said nine trustees under said trust agreement for the control of the corporations and parties thereto, and pursues, carries out, and executes the purposes and objects of said trust agreement, as above set out, in this State; that in pursuance of the policy fixed by said trust agreement it has occupied and still occupies and carries on its business exclusively in the subdivision of the territory of the United States designated and outlined

as aforesaid, to wit, in southwestern Missouri, Arkansas, Texa
Indian Territory, and Oklahoma Territory, in the Unite
25 States, and that it does not invade or transact any of it
business in any portion of the territory allotted to othe
members and parties to said trust agreement or compete with them in same; that none of the other members or parties to said trus agreement enter with their business or compete with said Waters Pierce Oil Company in the sale of its oils or otherwise in the abov territory allotted to and accepted by said Waters-Pierce Oil Com pany; that said Waters-Pierce Oil Company adopts and pursue and carries out in said territory the same methods of driving ou and overcoming competition in the sale of oils therein as is adopte and pursued by other members of said trust agreement in the par ticular territory in the United States in which their respective busi ness is pursued; that in the market of Texas, by reason of sai trust agreement and the purposes and policies of same, there is n competition in the sale of oils or other products of petroleum be tween said Waters-Pierce Oil Company and any member or party to said trust agreements; that by reason of the facts above state the said Waters-Pierce Oil Company has monopolized and stil monopolizes and controls the trade in petroleum and its product in Texas, and is enabled to and does carry out, observe, and per form the unlawful purposes of said trust agreements in reference t the trade in said commodities, which are of prime importance and necessity to the people of this State.

11. Plaintiff further shows that since the 6th day of July, 1889 said defendant, Waters-Pierce Oil Company, has been engaged and is still engaged in dealing in and selling the products of petroleum, such as refined oils, illuminating and lubricating oils, in this State that during said time said company has made and is still making through its agents and officers in this State, contracts and agree ments by and between it and various merchants and others dealing in, buying, and selling similar oils in this State, by the terms o which agreements and contracts said merchants and other dealers in said commodities, in consideration that said defendant company would pay them a small rebate on the oil purchased by them
26 or for other considerations unknown to plaintiff, agreed and contracted to and with said company that they would not buy any oils from any other person or corporation, but would deal with and buy and sell oils obtained from said defendant company exclusively; that said contracts so made, as aforesaid, between said defendant company, through its agents and officers, and said mer chants and other dealers in such oils are and were sometimes verbal and sometimes in writing; that among the merchants and other dealers in this State with whom defendant company has entered into and made such contracts are the following, to wit:

B. P. Stephenson, a resident of Yoakum, De Witt county, Texas, said contract being made in the year 1892 or 1893; Hair & Gray, residents of Belton, in Bell county, Texas, said contract being en tered into about July, 1894; Stayton & Howard, of McLennan county, Texas, said contract being made in 1892; E F. Ehlinger,

of Goliad county, Texas, said contracts being made in the year 1892; E. A. Arnin, of Fayette county, Texas, said contract being made in the year 1894; H. Becker, of Washington county, Texas, said contract being made in the year 1893; H. Lillienstein, of Titus county, Texas, said contract being made in the year 1895; John Schumaker & Co., White and Bradshaw, and C. J. Rosenberg, of La Grange, Fayette county, Texas; F. M. Ramsey, W. C. Burr, Laredo, Texas.

12. Plaintiff avers that said defendant company, through its officers and agents, since said 6th day of July, 1889, has made and still is entering into and making contracts and agreements, both verbal and in writing, with various and sundry merchants and others dealing in, buying, and selling oils, the product of petroleum, in this State, by the terms of which said merchants and others dealing in such oils, as aforesaid, contracted and agreed with said defendant company to buy from and sell the oils of said company exclusively, and in some instances further agreed not to sell the oils so bought, as aforesaid, from said defendant company to any one buying from or dealing with any other person or corpo-
27 ration dealing in such oils in competition with said defendant company; that among the merchants and other dealers with whom such contracts were made and the time and places when same were made and entered into are the following, to wit:

W. A. Bryan, of McLennan county, Texas, in 1892 and 1893.

J. W. Thomason, of McLennan county, Texas, in 1894.

Herman Voss, of Coryell county, Texas, in August, 1893.

Hair & Gray, of Bell county, Texas, in 1894.

W. M. Foster, of Brazos county, Texas, in 1892.

T. A. Fuller, of Bowie county, Texas, in 1891.

13. Plaintiff further avers that said defendant company since July 6th, 1889, has made and entered into, and still is making and entering into, through its officers and agents in this State, agreements and contracts by and between it and various merchants and others dealing in and buying and selling oils the products of petroleum, by the terms of which said merchants and others dealing in such oils contract and agree with said defendant company, after purchasing from it its said oils, to sell the same to others desiring to purchase from them at prices fixed and established by it or its agents and officers; that among the merchants and other dealers so making and entering into such contracts are the following, to wit:

W. A. Bryan, a resident of McLennan county, Texas; said contract made in 1892 or 1893.

W. F. Hanning, a resident of Caldwell county, Texas; said contract made in the latter part of 1892.

H. Schmidt, a resident of Robertson county, Texas; said contract made about the year 1892 or 1893.

14. Plaintiff avers that prior to July 6th, 1889, to wit, about the year 1881, the said defendant company entered into a contract in writing with certain jobbers and wholesale merchants in the city of Brownsville, Texas, among whom was the firm of Bloomberg
28 & Rapheal, by which said defendant company purchased the

oil of said firm then on hand, and said firm of Bloomberg & Rapheal agreed and became bound to purchase from said defendant company all future requirements of oil at prices established by said defendant company and its agents, from which prices said firm was to receive a rebate of fifteen cents per box on making settlement therefor at the end of each month, said rebate to be extended only to those who are parties to said contract, and said jobbers and wholesalers and said firm of Bloomberg & Rapheal were to sell said oil to retain dealers at the invoice price of same fixed by said defendant company; that plaintiff is unable to give a better description of said contract for the reason the same is in the possession of the defendant. Plaintiff further alleges that after the 6th day of July, 1889, the said defendant carried out and continued to do business with said firm under said contract, and until about the 6th day of October, 1896, insisted upon all its provisions.

15. Plaintiff also avers that said defendant company on or about Jan'y 1st, 1890, entered into a contract in writing with J. S. & M. H. Cross, wholesale merchants in the city of Brownsville, whereby it was agreed that said firm was to buy all oil needed in its business from said defendant company, and the said dealers were to receive from said defendant one and one-half cents per gallon rebate; and said firm further agreeing not to sell oil for a price less than the schedule invoice price of said company, said contract by its provisions could be cancelled by notifying the company ten days in advance. By the terms of said contract said firm became bound to buy all its oil from said defendant, and were also bound to sell at a price fixed by said defendant, and that under said contract the said defendant has been since said date doing business with said firm.

16. That since July 6th, 1889, the said defendant company has been selling oil to J. H. Fernandez, a merchant in the city of
29 Brownsville, under a contract in writing, by which said Fernandez was to buy all oil bought by him in his business from said defendant company, and was to receive from said company a rebate of fifteen cents per box on the invoice price; and it was further agreed that said Fernandez shall sell oil at a price fixed by said defendant company, and in case oil was purchased from any one else said merchant was subject to pay the said defendant company a penalty in money; that under said contract said defendant company did business with said merchant until December 23rd, 1896.

17. The plaintiff alleges that previous to December 24th, 1896, the said defendant company had for many years been doing business and selling oil to M. Alonzo and other merchants in the city of Brownsville, Texas, under a contract in writing with said parties, duly executed, by which said Alonzo, and also said other merchants, agreed to buy all their oils used in their business respectively from said defendant company and was to receive a rebate of twenty cents per box on the better quality and fifteen cents per box on common oil, and the said defendant agreed to make a reduction on the price of oil in case there was other oil on the market selling at a lower price than the company's price. The contract could be

cancelled by giving the company ten days' notice, and said company fixed the minimum price at which said oil could be sold by said merchants; that under said contract said parties thereto did business thereunder and in said manner until said December 24th, 1896.

18. That previous to December 24th, 1896, the said defendant company had for many years being doing business with and selling oil to Nicholas Lopez, of the city of Brownsville, Texas, under a contract in writing, by which said Lopez was to buy all his oil from said company and was to receive a rebate of fifteen cents per box on all oil purchased by him from said company, said contract to be cancelled at any time by giving ten days' notice to said company, and said Lopez was further required to sell no oil at a price less than the invoice price, and by the terms of said contract said Lopez was subject to a penalty of twenty-five dollars in case he purchased oil from any one else other than said company defendant; that under said contract said parties did business thereunder and in the manner mentioned therein until December 24th, 1896.

19. That for about three years prior to October 8th, 1896, and up to said time the said defendant company did business with and sold oil to Miguel Fernandez, a merchant in the said city of Brownsville, under a contract in writing stipulating that said merchant should buy all his oils from said defendant company and receive a discount of fifteen cents per box upon the invoice price, and was bound thereby not to sell oil for less price than the invoice price under a penalty of fifty dollars, payable to said defendant company.

20. That defendant company is seeking to renew all of said contracts above alleged as having been cancelled, and is seeking to carry on its said business in said city under same.

21. Plaintiff avers that all of such contracts as alleged and above described were made by the agents of said defendant company and were authorized by it, and were fully ratified and carried out by said company after same had been so made. The plaintiff cannot give more definitely the terms, considerations, and dates of such contracts than as above given, because same are unknown to plaintiff. Plaintiff notifies said defendant to produce on the trial of this case the written contracts or copies of same made by it as above alleged with said merchants and others dealing in said oils, or secondary evidence of their contents will be introduced on the trial of this case.

22. Plaintiff further shows that the Eagle Refining Company was and is a private corporation legally incorporated under the laws of the State of Ohio; that its principal office and officers are located in the city of Cleveland, Ohio; that the capital stock of said corporation was and is the sum of fifty thousand dollars; that the purposes and objects for which said company was incorporated and formed *was* and *is* to manufacture, refine, compound, purchase, and deal in all kinds of oils and greases, petroleum and its various products and all things incident thereto for profit. Plaintiff avers that it does not know the names and

residence of its officers or any of its agents; that it is informed and so states that it has now no officers or agents in this State; that on, to wit, the 6th day of November, A. D. 1891, said company filed in the department of state in the State of Texas a certified copy of its articles of incorporation, in accordance with the requirements of law, and paid the fee required by law and obtained a permit to carry on its business in this State; that under and by virtue of said authority so obtained as aforesaid said company, on said date, began to transact business in this State; that from said date said company began to pursue and carry on the business in this State of dealing in, selling, and trading in the products of petroleum, consisting of refined, illuminating, and other oils, in honest and sharp competition with said Waters-Pierce Oil Company; that said corporation continued to pursue and carry on said business in its name in this State from said date up to about the 13th day of October, 1894, at which date the said Eagle Refining Company and the said Waters-Pierce Oil Company made and entered into a certain agreement, combination, and trust, the exact terms of which are unknown to your petitioner, but petitioner charges that same was in writing, and the said defendant is hereby notified to produce same or a certified copy thereof on the trial of this cause, or secondary evidence of its contents will be introduced. Plaintiff alleges that by the terms of said agreement the Waters-Pierce Oil Company bought, obtained, or leased or secured the control of all the property and business and franchises of said Eagle Refining Company in said State of
32 Texas and other States, and obtained and secured the exclusive right to operate its business and exercise its privileges and franchises and use its name, labels, and trade-marks in this State and other States, and the said Eagle Refining Company agreed to withdraw from doing any business in said State in competition with said Waters-Pierce Oil Company for the period of fifteen years; that since said date said Waters-Pierce Oil Company has been doing business in this State in the name of the Eagle Refining Company, said business being carried on in apparent but not real competition with said Waters-Pierce Oil Company and said business consisting of dealing in and selling the products of petroleum, refined oils, lubricating and illuminated oil-. Plaintiff avers that the said Waters-Pierce Oil Company and said Eagle Refining Company were and are corporations engaged in the same line of business, and that said contract or agreement above stated affected the production of petroleum and also affected the sale of its products in this State, said petroleum and its products being articles of such general use that the public is interested in the production and sale of same.

23. Plaintiff further avers that previous to the year 1890 one C. W. Robinson, a resident of Houston, Harris county, Texas, in this State, was engaged independently and in his own name and for himself in dealing in, buying, and selling various kinds of oils, the products of petroleum in this State, in competition with said Waters-Pierce Oil Company; that about the — day of 1890 the said C. W. Robinson and Waters-Pierce Oil Company made and entered into an agreement, by the terms of which the said Waters-Pierce Oil Com-

pany obtained and secured the control, management, and conduct of the said business of C. W. Robinson, and by the terms of which, though said business is conducted in the name of C. W. Robinson, as before said date, yet same is really controlled and conducted by said Waters-Pierce Oil Company; that by the terms of said contract and agreement the said C. W. Robinson is to buy and sell exclusively the oils of said Waters-Pierce Oil Company, and refrain from
33 dealing in, buying, or selling any oils obtained from any other course; that by the terms of said contract the said business of C. W. Robinson is carried on in the name of C. W. Robinson and in apparent but not real competition with said Waters-Pierce Oil Company; that said contract and agreement has been since the said date of the making of same and still is in full force and effect.

24. Plaintiff avers and charges that the above-described contracts and agreements by and between the said defendant, Waters-Pierce Oil Company, and the various merchants and others dealing in oils in this State, and particularly the above-described agreement by and between said company and the Eagle Refining Company and the above-described agreement by and between said Waters-Pierce Oil Company and said C. W. Robinson, were each and all intended to and did create and result in a combination of their capital, skill, and acts of said Waters-Pierce Oil Company and said several merchants and others dealing in oils in this State and between said Waters-Pierce Oil Company and said Eagle Refining Company and between said Waters-Pierce Oil Company and said C. W. Robinson for the following purposes, to wit:

1st. To create and carry out restrictions in trade, to wit, in the buying and selling of products of petroleum, refined oils, illuminating oils, in this State.

2nd. To increase the price of said products of petroleum in this State.

3rd. To prevent competition in the sale and purchase of petroleum and its products in this State.

4th. To fix at a standard or figure the price of said petroleum and its products whereby its price to the public should be controlled and established.

5th. For the purpose of binding and obligating said parties to said agreements not to sell and dispose of petroleum and its said products below a common standard figure and to keep the
34 price of same at a fixed or graded figure and to establish and settle the price of said petroleum and its said products between themselves and others so as to preclude free and unrestricted competition among themselves and others in the sale of same, and to pool and combine and unite their interests in the sale of same that its price might be affected.

Plaintiff alleges that petroleum and its products are commodities and articles of merchandise of prime necessity to the people and generally used and consumed by them, and are commodities intended for sale, use, and consumption in this State; that said agreement and contracts resulted in effecting and carrying out said above-

named purpose to the great injury and detriment of the people of this State.

25. Plaintiff further avers that said Waters-Pierce Oil Company since the date of its said permit to transact its business in this State has been and is now guilty of gross abuse and misuse of its chartered privileges and franchises in this State, for plaintiff says that in order to monopolize and control the oil trade in this State said Waters-Pierce Oil Company, through its officers and agents, has unlawfully entered into and carried out the said contracts and agreements above set forth, and has entered into and is still engaged in making and carrying out similar contracts and agreements with other merchants and dealers in oils in this State; that the course of business pursued by said company in this State is as follows: Whenever in any locality in this State any person or corporation sells or buys the products of petroleum obtained from any person or corporation except said Waters-Pierce Oil Company or deals in oils in competition with said company said Waters-Pierce Oil Company, through its agents and officers, immediately cuts the price of its oils below the reasonable and fair market price of same, and refuses to sell the same at all or except at an exorbitant and higher price than the price at which it sells to those dealing exclusively with it—to those merchants or other dealers who buy such competitive oils; that at said times and places said Waters-Pierce Oil Company, through its officers and agents, pursues and carries out a system of threats and intimidations and bribery to prevent parties dealing in oils in this State from buying or selling competitive oils, for plaintiff says said Waters-Pierce Oil Company, through its officers and agents, refuses to sell its oils to parties buying any competitive oils, threatens said parties intending to or purchasing such competitive oils with a ruinous reduction in the price of said oils and with loss to them in dealing in same, and pays rebates in the price of oils to induce buyers of oil not to patronize a competitor in its business, and by offers of money or the payment of the expense incident thereto seeks to get and does induce parties ordering such competitive oils for the purpose of selling same to countermand such orders and refuse to take same after entering into a contract to purchase. Plaintiff alleges that the above is the general course of dealing pursued throughout this State by said Waters-Pierce Oil Company, through its agents and officers in the transaction of its business; that after the competitive oil is by such methods driven out of the markets in this State the said Waters-Pierce Oil Company, through its officers and agents, immediately raises the price of its oils far above the true and reasonable market value of same, and extort such unreasonable and exorbitant prices from the consumers of oil in this State, and keep its oils at such prices.

That the above-stated course of dealing by said Waters-Pierce Oil Company has resulted in the complete monopolization by said company of the oil trade of this State and in stifling and throttling legitimate competition in same, to the great injury of the people of this State.

26. Plaintiff avers that by reason of the contracts, agreements,

combinations, and trusts made and entered into by said Waters-Pierce Oil Company, through its stockholders, officers, directors, and agents, as above alleged and shown, and by reason of the
36 gross abuse and misuses by said Waters-Pierce Oil Company of its corporate privileges and franchises in this State, as above shown, said Waters-Pierce Oil Company has forfeited its right and permit to do business in this State; that the said unlawful combinations, agreements, conspiracies, and trusts made and entered into and carried out by said defendant company and its officers and agents in this State and said abuses and misuse of its corporate powers by said company, as above stated and shown, are frauds upon this State, in violation and contravention of its laws, in restraint of trade, destructive of competition, and tends to and do create a monopoly in this State, and that same now are and unless prohibited will continue to be grievous burdens upon the people of this State and the public, and are against public policy and should be restrained.

Wherefore plaintiff prays that this court do immediately issue writ of injunction, restraining and prohibiting the said Waters-Pierce Oil Company and its said managers, its officers, agents, and representatives, from carrying out the above-described agreements, combinations, and trusts, and from the doing the unlawful acts and things above mentioned and pursuing the course of conduct in this State to drive out and stifle competition in trade in petroleum and its products, as above alleged, and from the misuse and abuse of its corporate powers and privileges, as above stated, and prohibiting and restraining said Waters-Pierce Oil Company and its agents, managers, officers, and representatives from any violation of the anti-trust law of this State.

Plaintiff further prays that each and all of the above-named defendants be cited to answer this petition, as required by law, and that upon final hearing said temporary injunction be perpetuated and a decree and judgment rendered cancelling said Waters-Pierce Oil Company's permit to do business in this State and prohibiting it from doing any business in said State, either by itself or through its officers, managers, agents, or representatives; and plaintiff
37 prays for all other relief, judgments, and decrees, general and special, legal and equitable, interlocutory and final, to which under the law and facts of this case it may be entitled, and will ever pray, etc.

M. M. CRANE,
Attorney Gen., &
T. A. FULLER, *Assistant,*
Attorneys for the State.

(Endorsed:) No. 12589. The State of Texas *v.* Waters-Pierce Oil Co. *et al.*. Plaintiff's 1st amended original petition. Filed May 12, 1897. Jas. P. Hart, clerk D. C., T. C.

Defendants' First Amended Original Answer.

Filed June 2nd, 1897.

In the District Court, 26th Judicial District, at Austin, Texas.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

In the above numbered and entitled cause come the Waters-Pierce Oil Company, E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Louis Fries, the defendants herein, and, with leave of the court, file this their first amended original answer in reply to the first amended original petition of plaintiff herein filed on, to wit, May 12th, 1897, and for such answer these defendants plead as follows:

38 I.

These defendants here now demur generally to plaintiff's cause of action and say that the allegations and averments in plaintiff's said first amended original petition in manner and form as therein set forth are not sufficient in law to entitle plaintiff to have and maintain this action or to require further answer from these defendants for the following reasons, to wit:

These defendants say that this prosecution and proceeding is instituted under and by virtue of two acts of the legislature of the State of Texas, as follows:

1. "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30th, 1889.

2. "An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act," approved April 30th, 1895.

Now, these defendants say that each and both of said statutes are null, void, and inoperative, because they and their provisions are violative of both the Constitution of the United States and of the State of Texas, in this, to wit:

1. Said statutes discriminate between different classes of persons and citizens of the State of Texas and of the United States and deny to certain persons and citizens the equal protection of the laws, for that said statutes authorize the punishment of certain citizens and classes of citizens for acts and omissions, which acts and omissions they expressly authorize other classes and citizens to do and perform.

Said acts are in conflict with the constitution of the State
39 of Texas and the bill of rights therein, which declares that all men shall have equal rights, and that no man or set of

men are entitled to exclusive public emoluments or profits, but in consideration of public service, and that no citizen shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by due course of the law of the land.

Said acts are in conflict with the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law, because while pretending to embrace within its purview all classes and conditions of citizens, in order to prevent combinations by which the costs of the necessaries and comforts of life to the people might be increased, they are by their express exemption of citizens engaged in the business of live stock and agricultural products in the hands of the producer or raiser, and in giving exemption to organizations of laborers for the purpose of maintaining any standard of wages, are limited in their application to a comparatively small portion of the citizenship, who are thereby subjected to pains and penalties not inflicted upon the great majority of people under similar circumstances and conditions. Such legislation is class legislation within the meaning of the law and is thereby null, void, and of no effect.

2. Because said acts of March 30th, 1889, and April 30th, 1895, are inoperative and void as to persons resident beyond the territorial limits of the State of Texas and who are not and never have been personally present in the State of Texas nor done any act within the State of Texas which would subject them to the penalties prescribed.

3. Said acts are unconstitutional, null and void, and of no effect in so far as they denounce penalties against any person, firm, or corporation by reason of any act or dealing of interstate com-
40 merce within the meaning of the law, said State of Texas being in all of its departments wholly without jurisdiction in such cases; and the allegations of plaintiff's petition show upon the face of the petition that these defendants, and especially the Waters-Pierce Oil Company, are engaged in the manufacture, shipment, and transportation of oil from some other States of the United States into the State of Texas, and that they sell the same in bulk and in unbroken packages, and such acts constitute interstate commerce within the meaning and intention of the Constitution of the United States and the laws of Congress passed in pursuance thereof, and the district court of the 26th judicial district of the State of Texas, wherein this cause is pending, has no jurisdiction of any such acts by suit or otherwise.

4. Because the said act of March 30th, 1889, does not prohibit a trust or declare it illegal; neither does it declare it an offense or propose to punish it, but merely defines a trust without denouncing it, and is therefore not a law and never was a penal law in the State of Texas and no suit or prosecution can be maintained under it. And the allegations of plaintiff's said first amended original petition show that most of the transactions complained of by the plaintiff

against these defendants occurred long prior to the passage of the act of April 30th, 1895.

5. Said before-recited acts of the legislature of the State of Texas are further unconstitutional, null, and void for the following reasons, to wit:

Section 1, article 14, of the Constitution of the United States provides as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law."

And section 16, article 1, of the constitution of the State of Texas provides as follows:

"No citizen of this State shall be deprived of life, liberty, property or privileges, outlawed, exiled or in any manner disfranchised except by due course of the law of the land."

41 Said acts of the legislature of the State of Texas are in conflict with said provisions of the Constitution of the United States, and also the bill of rights in said Constitution hereinbefore set forth, and of the provisions of the constitution of the State of Texas, in so far as said acts attempt to restrict the rights of certain classes of citizens of the said State of Texas and of other States, including these defendants, to carry on their business enterprises in customary and lawful manner and to fix and limit the prices of merchandise dealt in and offered for sale by them, and to make such contracts and agreements with merchants and others dealing in similar commodities for the payment to the latter of rebates on commodities sold to them, or to make other contracts such as are specified in subdivisions 12, 13, 23, 24, 25, and 26 of plaintiff's said first amended original petition. Wherefore defendants aver that said acts are unconstitutional, null, and void.

6. Said act of the legislature of the State of Texas approved April 30th, 1895, as aforesaid, is further violative of the constitution of the State of Texas in this, to wit: Article 3, section 35, of the constitution of the State of Texas provides as follows:

"No bill (except general appropriation bills which may embrace the various subjects and accounts for and on account of which moneys are appropriated) shall contain more than one subject which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void as to so much thereof as shall not be so expressed."

Said act of April 30th, 1895, relates to subjects not expressed in the title of said act, and the enacting clause of said act is in conflict with the title of said act in this, that said act purports in its title to be "An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas,

42 and to repeal all laws and parts of laws in conflict with this act," when the enacting clause of said act purports that the act shall be an amendment of some pre-existing act, and is as follows, to wit:

"SECTION 1. Be it enacted by the legislature of the State of Texas that an act entitled 'An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and asso-

ciations of persons connected with them and to promote free competition in the State of Texas' approved March 30th, 1889, be so amended as to hereafter read as follows:"

Wherefore these defendants say that said act of April 30th, 1895, has not been enacted by the legislature of the State of Texas in consonance with the constitution of said State, and is therefore null, void, and inoperative.

7. And for further causes these defendants demur as follows:

(*a.*) For that it appears upon the face of plaintiff's said first amended original petition that on, to wit, July 6th, 1889, the defendant The Waters-Pierce Oil Company did file in the office of the secretary of state of the State of Texas, in accordance with the requirements of the law, a certified copy of its articles of incorporation, and did then and there pay to the State of Texas the consideration therefor as required by law; whereupon and in conformity to law a permit was issued to said corporation to transact its business as stated in said articles of incorporation in the State of Texas for a term of ten years from said date. These defendants are advised by counsel and so aver that the legal effect of said transaction with the State of Texas was to create a contract upon a valuable consideration between the State of Texas and the Waters-Pierce Oil Company for the term of ten years, during which term the Waters-Pierce Oil Company was authorized to sell within the limits of the State of Texas naval stores, petroleum and its products and other oils, which contract is a valid and subsisting contract under the constitution and laws of the State of Texas and of the United
43 States, and under said constitutions it is incompetent for the State, as one of the parties to said contract, to abrogate or attempt to abrogate its permit to the Waters-Pierce Oil Company to transact said business within said term by virtue of any law passed subsequent to the execution of said contract.

(*b.*) Because it appears from the allegations in plaintiff's petition that the defendant The Waters-Pierce Oil Company and the other defendants herein were never parties to the Standard Oil agreement made and entered into on the 2nd day of January, 1882, in the city of New York and State of New York, and which contract or agreement constituting the Standard Oil trust is set forth at length in plaintiff's petition.

(*c.*) Because said Standard Oil agreement, as set forth in plaintiff's petition, was not at the time it was entered into contrary to the laws of the United States or of the State of Texas, but the same, as appears upon its face, was in all respects legitimate.

(*d.*) Because said Standard Oil trust agreement, as set forth in plaintiff's petition, shows that it was contemplated that all the stock mentioned in class 3 should be assigned to the trustees of the Standard Oil trust, and that there is no allegation in plaintiff's petition that this was ever done, in so far as the Waters-Pierce Oil Company is concerned.

(*e.*) Because it appears from the allegations in plaintiff's petition that said Standard Oil trust agreement was entered into by the various persons and corporations composing it, outside the limits and

beyond the jurisdiction of the State of Texas, and that the purpose of said agreement related wholly to commerce between the States, and said persons, firms, and corporations so entering into said agreement at the time and thereafter were not amenable to the laws of the State — Texas passed long subsequently thereto.

(*f.*) Because it appears from the face of plaintiff's said amended original petition and from the by-laws of said Standard Oil trust, therein set forth at length, that it was not the duty of the
44 trustees of said Standard Oil trust to exercise absolute supervision over the other companies or partnerships composing said trust, but only supervision as far as practicable, and it appears from the face of said petition that the Waters-Pierce Oil Company was never a member of said trust and was never subject to the supervision of the trustees of the Standard Oil trust in the control and management of its own corporate affairs.

(*g.*) Because the allegations of plaintiff's petition in subdivisions 7, 7½, and 8 manifest that the object and purposes of the alleged trust complained of relate exclusively to commerce between the States, over which, under the Constitution and laws of the United States, the State has no jurisdiction nor can the State affect the same by either legislative, judicial, or executive action, but the jurisdiction over interstate commerce is vested by said Constitution and laws of the United States exclusively in the Government of the United States, and because it further appears from the allegations of said paragraphs that the persons, firms, and corporations as therein alleged composing and controlling the Standard Oil trust are and have always been beyond the jurisdiction of the State of Texas.

(*h.*) Because it appears from the face of plaintiff's petition, as set forth in paragraph 9 of said petition, that the acts and doings of the Standard Oil trust in the different States are not cognizable by the courts of Texas, in that any conspiracy against trade, if such conspiracy has been entered into in manner and form as alleged in said petition, was organized and operated beyond the limits of the State of Texas, to wit, in the State of New York, and, further, because the facts alleged in said paragraph 9 show that the particular party selling oils in the particular territory as therein alleged was only guilty of active competition in pursuance of the laws of Texas, and such acts as are therein alleged in said paragraph 9 constitute no violation of law.

45 (*i.*) Because it appears from the face of plaintiff's petition, as set forth in paragraph 10 of said petition, that the State of Texas has no jurisdiction over the rights, powers, and franchises of a corporation created under the laws of a different State, to wit, the State of Missouri, and said petition sets forth no allegation as to what are the laws of the State of Missouri, as to what privileges, rights, and franchises were conferred or were not conferred upon the defendant The Waters-Pierce Oil Company by said laws of the State of Missouri, and there is no allegation in said paragraph or in said petition that the Standard Oil trustees have ever actually controlled and managed the Waters-Pierce Oil Company, and the

allegations of said petition in said paragraph 10 that the Waters-Pierce Oil Company have never taken any action as to the stock or shares of said corporation alleged to have been held and to be held by the trustees of the Standard Oil trust are wholly insufficient and furnish no cause of action to plaintiff, because the Waters-Pierce Oil Company cannot in law control its shares of stock after their issuance and delivery, and can in law assert no control over its shareholders as to what disposition they may choose to make of their property consisting of such shares, nor could said Waters-Pierce Oil Company in law successfully prosecute any legal or equitable action to divest its shareholders of their property in such shares, because of any personal action on the part of said shareholders. There are no allegations in said paragraph that the persons holding shares in the Waters-Pierce Oil Company, and who may have joined the trust and assigned their respective shares to the trustees of said trust, or who may be acting as trustees for the trust, are incompetent to hold and own shares of stock in the Waters-Pierce Oil Company, and the allegation that the Waters-Pierce Oil Company is guilty of the same practices and methods as set forth in paragraph 9 of the petition is likewise insufficient in law for the reason stated in paragraph "*h*" of this demurrer, to wit, because the facts alleged in said paragraph 9 show that the

46 Waters-Pierce Oil Company in the conduct of their business in the State of Texas has obeyed the laws of the State of Texas by engaging in active competition in the sale of oils in pursuance of such laws, and such acts as are alleged in paragraph 9 of the petition constitute no violation of law.

(*j*.) Because the allegations of plaintiff's petition as set forth in paragraphs 11, 12, and 13 of said petition show that the agreements therein alleged, if made, do not constitute violations of law, in that such contracts are usual, proper, and customary in all lines of trade throughout the United States of America.

(*k*.) Because the allegations of plaintiff's petition as set forth in paragraph 22 of said petition, with reference to the transactions and dealings between the Waters-Pierce Oil Company and the Eagle Refining Company, show upon the face of said allegations that said contracts and transactions were legitimate, proper, and customary transactions and violative of no law of the State of Texas, in that the Waters-Pierce Oil Company had a right to buy out the Texas business of the Eagle Refining Company, even though said Eagle Refining Company was at the time engaged in competition with it, the said Waters-Pierce Oil Company, and also it, said Waters-Pierce Oil Company, had a right to contract with the Eagle Refining Company that it, the Waters-Pierce Oil Company, might use the name of the Eagle Refining Company in the transaction of some of its business within the State of Texas.

(*l*.) Because the allegations of plaintiff's petition in paragraph 23 of said petition, with reference to the contracts and transactions between the Waters-Pierce Oil Company and C. W. Robinson, in the State of Texas, show upon their face that said transactions were legitimate, proper, and customary and violative of no law of the

State of Texas, in that the Waters-Pierce Oil Company had the legal right to buy out the business of C. W. Robinson, at Houston, in said State, even though the said C. W. Robinson was engaged in competition in the oil trade with said Waters-Pierce
47 Oil Company, and had a right to employ the said C. W. Robinson to conduct its business for it, the said Waters-Pierce Oil Company, in the State of Texas, upon such terms, conditions, and agreements as were deemed necessary and proper between the contracting parties.

(*m.*) Because the allegations of plaintiff's petition as set forth at length in paragraph 26 of said petition are insufficient, if true, to show that the Waters-Pierce Oil Company has been guilty of any violation of the laws of the State of Texas, for that the Waters-Pierce Oil Company in law has and had a right to reduce the prices for oils at any time that it became necessary to protect its trade or for any other good and sufficient reason inuring to the said Waters-Pierce Oil Company without violation of law; and the Waters-Pierce Oil Company had a right in law in any locality in the State of Texas where it did business to extend this right of competition to any length, regardless of losses to itself or losses to its competitors in the active pursuit of its trade and business, and said acts and transactions set forth in said paragraph 26 are in strict accordance with the law of the State of Texas under which this proceeding is instituted, and which, among other purposes, as stated in its title, was enacted for the purpose of promoting active competition in the State of Texas; and said acts and transactions of the Waters-Pierce Oil Company, as therein set forth in said paragraph 26, manifest an observance of said statute by the Waters-Pierce Oil Company instead of its violation.

(*n.*) Said amended original petition of plaintiff is further insufficient in law, for that it appears from the face of said petition that the plaintiff is seeking and attempting in this action to combine and unite in one action pretended and alleged causes of forfeiture against defendant The Waters-Pierce Oil Company which accrued under the act of March 30th, 1889, and prior to April 30th, 1895, with other rights of pretended forfeiture which may have occurred under the act aforesaid of April 30th, 1895. These defend-
48 ants say that under the terms of section 15 of the aforesaid act of April 30th, 1895, which repealed expressly all laws and parts of laws in conflict with said act, necessarily and in legal effect repealed the act of March 30th, 1889, in that it was an entire substitution for said last-named act, and said repeal occurred prior to the institution of this suit. These defendants say that it is not competent for the legislature of the State of Texas in the enactment of the act of March 30th, 1895, as was attempted in said section 13 of said act, to preserve for all time in the future a right of action in the State of Texas which might have accrued to said State under the terms of the act of March 30th, 1889, regardless of whether any action or suit was pending at the time of said repeal for the enforcement of any penalty or for the prohibition of foreign corporations from doing business in this State. These defendants say that as for

causes of action which might have accrued to the State of Texas by way of forfeiture as aforesaid, or in the matter of prohibition as aforesaid, except such actions as were then pending at the time of said repeal under the act of March 30th, 1889, were necessarily and in legal effect and by operation of law abrogated and taken away from the State of Texas, and that it is not competent for the State of Texas to proceed against this defendant or any other corporation for any act or omission prohibited or made penal by said act of March 30th, 1889, unless proceedings thereof had been instituted and were pending in some court of competent jurisdiction at the date of said repeal. These defendants further say that it is not competent or permissible for the State of Texas to unite in one action, as is attempted here, different causes of action which have accrued or which might have accrued to the State against the defendant The Waters-Pierce Oil Company under these two distinct legislative enactments, but the State of Texas must elect, in any action or proceeding instituted since the passage of the act of
49 April 30th, 1895, to proceed solely under the provisions of said act, and for acts and transactions deemed violative of the provisions of said act and not for transactions, omissions, or acts deemed violative of the provisions of the repealed act of March 30th, 1889.

(*o.*) Further demurring to plaintiff's said amended original petition, the defendants say and submit to the court that if it be held by the court that it is competent and permissible for the State of Texas to now set up and prosecute against the defendant The Waters-Pierce Oil Company causes of action and forfeiture accrued under the act of March 30th, 1889, and which were not instituted by said State of Texas prior to the repeal of said act, then these defendants say that in law the State of Texas must elect under which act of the legislature of said State touching the premises it shall proceed, and that it is not permissible for the State of Texas to unite, as aforesaid, in one action different causes of action accruing under different laws, one of which laws has been repealed. The defendants therefore move the court *in limine* to require the State of Texas to elect in this action for which acts or transactions it proposes to proceed against the defendant The Waters Pierce Oil Company, whether for acts occurring during the existence of the act of March 30th, 1889, or for acts or transactions occurring since the repeal of said act of March 30, 1889, and under the provisions of the present law, approved April 30, 1895.

(*p.*) These defendants further demur to paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19 of plaintiff's said first amended original petition for the following reasons, to wit:

1. The allegations of paragraph 11 of said amended original petition show that if any contract or agreement was made by the defendant The Waters-Pierce Oil Company with B. P. Stevenson, of Yoakum, Dewitt county, Texas, and with Hair & Gray, of Belton, Texas, and with Stayton & Howard, of McLennan county, Texas, and with E. F. Ehlinger, of Goliad county, Texas, and with E. A.

Arnim, of Fayette county, Texas, and with H. Becker, of
50 Washington county, Texas, it appears from the face of said amended petition that said alleged and pretended contracts were entered into prior to April 30th, 1895, during the existence of the act of the legislature of the State of Texas, hereinbefore recited, of March 30th, 1889, which has been repealed and is no longer in force, and there is no allegation in said petition that at the time of said repeal any action, suit, or proceeding was then pending in behalf of the State of Texas against the Waters-Pierce Oil Company or these other defendants for any act or transaction of theirs made and done during the existence of said act; but, on the contrary, it appears from the record in this case that this suit was not instituted by the State of Texas until February 5th, 1896, and it is not competent for the State of Texas, even under the provisions of the act if April 30th, 1895, to prosecute this action against these defendants for any act, omission, or failure of duty or violation of law had and done under the provisions of the repealed law of March 30th, 1889.

2. Because it appears from the face of the petition that if any contract was entered into of any nature between the defendant The Waters-Pierce Oil Company and John Shoemaker & Co., White & Bradshaw, C. J. Rosenberg, F. M. Ramsey, or W. C. Burr, as alleged in paragraph 11 of plaintiff's said amended original petition, such pretended contract was entered into since the passage of the act of March 30th, 1889, and the alleged or pretented contract or contracts set up in said paragraph were legal and authorized by law prior to passage of said act of March 30th, 1889.

3. The allegations of said paragraph 11, as to the pretended contract between the Waters-Pierce Oil Company and H. Lilian Stein, of Titus county, Texas, *is* insufficient and not permissible, because it appears from the face of said amended original petition that The State of Texas, plaintiff herein, is attempting to combine thereby a cause of action accruing to it under the act of April 30, 1895, with various other causes of action with reference to the alleged contracts with other individuals and firms named in said para-
51 graph 11, which accrued under the act of March 30, 1889.

4. The allegation in said first amended original petition of plaintiff in paragraph 12 is wholly insufficient, because it appears therefrom that if any contracts were made such as are alleged in said paragraph by the defendant The Waters-Pierce Oil Company with the parties therein named, such contracts were made and entered into long prior to the passage of the act of April 30th, 1895, and during the existence of the act of March 30th, 1889, to wit, in the years 1891, 1892, 1893, and 1894, which act of March 30th, 1889, was repealed long before the institution of this suit, and such combination of acts and transactions under the repealed law with acts and transactions alleged to have occurred under the existing act of April 30th, 1895, are not permissible in law.

5. And defendants demur to paragraph 13 of said first amended original petition for the reason that it appears from the face thereof that if any contracts were entered into between the defendant The

Waters-Pierce Oil Company and the different persons and firms herein mentioned, such contracts were made and entered into in he years 1892 and 1893, long prior to the passage of the act of April 30th, 1895, which repealed the act of March 30th, 1889, and t is not permissible for the State to seek any recovery, as attempted n this action, under the provisions of said repealed law, or to commingle its causes of action accruing under said repealed law with ny pretended causes of action which have accrued under the existing act of April 30th, 1895.

6. These defendants further demur to paragraph 14 of plaintiff's first amended original petition, as aforesaid, for that it appears from the face of said paragraph that if any contract was entered into between the defendant The Waters-Pierce Oil Company and the firm of Bloomberg & Raphael, of Brownsville, Texas, as therein alleged, such contract was entered into prior to the passage of the act of July 6, 1889 (March 30, 1889), to wit, in the year 1881, and
52 at the time said contract was made the contract, as therein alleged and set forth, was legal and proper and not contrary to the laws of the State of Texas, and it is not competent for the State of Texas, after a contract has been entered into which is legal and authorized at the date thereof, to impair, abrogate, or in any manner affect such legal and authorized contract by subsequent legislation under the Constitution of the United States.

7. The allegations of paragraph 15 of said first amended original petition are insufficient in law, for that it appears therefrom that if any contract was entered into between the defendant The Waters-Pierce Oil Company and J. S. and M. H. Cross, of Brownsville, Texas, in manner and form as alleged in said paragraph, such contract was entered into on or about January 1st, 1890, during the existence of the act of March 30th, 1889, which latter act was repealed in terms by the act of April 30th, 1895, and it is not competent now for the State of Texas to institute or prosecute for any cause of action which may have accrued to it under the terms of the repealed act of March 30, 1889, unless suits or proceedings were pending therefor in courts of competent jurisdiction at the date of the repeal of said act; and it appears from the record in this case that no suit or proceeding had been instituted by the State of Texas for any cause of action accrued under the act of March 30th, 1889, until long after the repeal of said act, to wit, February 5th, 1896, the date at which this proceeding was instituted; nor is it competent for the State to commingle in one and the same action different causes of action accruing under the repealed act of March 30, 1889, and the existing act of April 30, 1895, in manner and form as herein attempted.

8. The allegations of paragraph 16 of said first amended original petition are insufficient in law, because, as shown upon the face of said pleading, it appears that the State of Texas is attempting in this action to combine and commingle acts and transactions between The Waters-Pierce Oil Company, defendant, and J. H. Fer-
53 nandez, of Brownsville, Texas, which occurred during the existence of the act of March 30, 1889, with other acts and

transactions between said parties occurring under the act of April 30, 1895, which is not permissible in law.

9. The allegations of paragraph 17 of plaintiff's first amended original petition are insufficient in law, for that it appears from said allegations that if any contract or agreement was entered into between the Waters-Pierce Oil Company and M. Alonzo and other merchants in the city of Brownsville, Texas, touching the matters and things therein alleged, such contract may have been entered into in good faith long prior to the passage of the act of March 30, 1889, and at a time when the contracts, agreements, or transactions as therein alleged were lawful, the only allegation as to date being that the acts and transactions occurred previous to December 24th, 1896, and it does not appear from the allegations of said paragraph that said transactions, agreements, or arrangements were in any manner unlawful at the time they were entered into, and for the further reason, as alleged in previous demurrers with reference to other transactions with other parties, it appears that the State of Texas has attempted in this paragraph 17 to combine and commingle in one action different causes of action accruing under the terms of the act of March 30th, 1889, and the act of April 30, 1895.

10. The allegations of paragraph 18 of plaintiff's first amended original petition are insufficient in law, for that it appears from said allegations that if any contract or agreement was entered into between the Waters-Pierce Oil Company and M. Alonzo and other merchants in the city of Brownsville, Texas, touching the matters and things therein as alleged, such contract may have been entered into in good faith long prior to the passage of the act of March 30, 1889, and at a time when the contracts, agreements, or transactions, as therein alleged, were lawful, the only allegation as to
54 date being that the acts and transactions occurred previous to December 24, 1896, and it does not appear from the allegations of said paragraph that said transactions, agreements, or arrangements were in any manner unlawful at the time they were entered into, and for the further reason, as alleged in previous demurrers with reference to other transactions with other parties, it appears that the State of Texas has attempted in this paragraph 18 to combine and commingle in one action different causes of action accruing under the terms of the act of March 30, 1889, and the act of April 30, 1895.

11. The allegations of paragraph 19 of said first amended original petition are insufficient and not permissible in law, for that it appears therefrom that the State of Texas is attempting to sue in this one action on different causes of action which have accrued, respectively, under the repealed act of March 30, 1889, and the existing law of April 30, 1895.

12. The allegations of paragraph 20 of said first amended original petition are insufficient in law, because it is no violation either of the act of March 30, 1889, or of the act of April 30, 1895, for the defendant to seek to renew the contracts therein set up and alleged in the absence of further allegations that the defendant The Waters-

Pierce Oil Company had consummated such agreement or contract.

13. And for further causes of demurrer to paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of said first amended original petition these defendants say that the acts and transactions therein set up and alleged by plaintiff, if true, do not show any violation of the anti-trust laws of the State of Texas: and, further, the acts and transactions set up and alleged in said paragraphs as causes of forfeiture against the defendant The Waters Pierce Oil Company do not show any violation of law, in that at the dates on which
55 said occurrences are laid in plaintiff's said amended original petition there was no law, statutory or otherwise, in Texas, prohibiting a trust or combination in restraint of trade or in any manner condemning as illegal the acts and transactions so alleged and set up by plaintiff in said paragraphs.

And of all the foregoing demurrers the defendants pray judgment of the court.

II.

And for further answer in this behalf, if further answer be necessary, come the defendants, The Waters-Pierce Oil Company, E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Louis Fries, and here now deny all and singular the allegations and averments in the plaintiff's petition contained, and of this these defendants put themselves upon the country.

III.

And for further answer in this behalf the defendants, and especially The Waters-Pierce Oil Company, come and plead specially as follows, to wit:

1. The defendant The Waters-Pierce Oil Company shows to the court that it is the real defendant in this action, and that the other defendants named in plaintiff's petition are simply agents of this defendant The Waters-Pierce Oil Company within the State of Texas. The defendant The Waters-Pierce Oil Company further shows, by way of special defense to this suit or proceeding in behalf of the State of Texas as plaintiff, seeking the cancellation of the right of said defendant company to transact its business in the State of Texas, and to enjoin said defendant company from transacting any of its business in the State of Texas, and shows that the State of Texas is estopped from claiming or seeking any such right by reason of its solemn contract with this defendant, for that heretofore, to wit, on the 6th day of July, 1889, The State of Texas,
56 plaintiff herein, through its properly constituted and authorized officers, to wit, John M. Moore, then secretary of state for said State of Texas, and pursuant with the terms and provisions of an act of the legislature of the State of Texas entitled "An act to require foreign corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in this State, and to repeal an act approved April 2nd, 1887, entitled An act to require foreign

corporations to file their articles of incorporation with the secretary of state, and imposing certain conditions upon such corporations transacting business in the State, and providing for penalties for a violation of same," approved April 3rd, 1889, did, upon sufficient and lawful consideration and upon the performance of the terms and conditions by the defendant The Waters-Pierce Oil Company, issue to the said Waters-Pierce Oil Company the permission of the State of Texas to carry on its business in said State for the term of ten years from the date thereof, in accordance with the purposes specified in said enactment, and upon the issuance and delivery of said permit this defendant The Waters-Pierce Oil Company did pay to the State of Texas the fee then and there demanded under the provisions of said act, to wit, a fee of fifty dollars, which sum, as fee, was received by the State of Texas and was duly paid into the treasury of said State. This defendant here now pleads said permit for ten years from the 6th day of July, A. D. 1889, to the 6th day of July, 1899, as a valid and binding contract, voluntarily entered into by the State of Texas with this defendant, and which grants and guarantees to this defendant permission to carry on its business in the State of Texas for said period of ten years and as an estoppel against the State of Texas and in bar of this proceeding; and this defendant The Waters-Pierce Oil Company here now invokes for its protection that provision of the Constitution of the United States which forbids any State from passing a law impairing the obligation of a contract, and here now avers that the
57 acts and doings of the State of Texas, through its legal department, and especially the institution and prosecution of this suit or proceeding against the Waters-Pierce Oil Company, is void and of no effect under the Constitution of the United States; and this the Waters-Pierce Oil Company is ready to verify, and here now puts itself upon the country.

2. And for a further plea in this behalf comes The Waters-Pierce Oil Company, joined by its codefendants, and says that it, the Waters-Pierce Oil Company, is a corporation of the State of Missouri and was duly incorporated under the laws of the State of Missouri on, to wit, the 7th day of May, A. D. 1878, and by the laws of said State of Missouri said corporation was formed for the purpose of dealing in naval stores and dealing in and compounding petroleum and other oils and all the products thereof and buying and selling the same in the State of Missouri and other States. This defendant corporation further says that in pursuance of the powers conferred upon it by virtue of said act of incorporation under the laws of the State of Missouri it, said defendant, ever since has been engaged in dealing in naval stores and dealing in and compounding petroleum and other oils and all the products thereof and buying and selling the same in the State of Missouri and other States of the American Union; that this defendant, ever since its incorporation, as aforesaid, in the year 1878, and especially since the first day of January, 1889, has purchased its oils in the State of Pennsylvania, Ohio, Kentucky, and other States of the American Union outside of the State of Texas, and after refining the same has transported and caused to be trans-

ported certain portions of its purchases aforesaid in oil to the State of Texas, and has there sold the same in unbroken packages to the merchants of Texas for the purpose of retail to the people of Texas, and this defendant corporation has at no time engaged in domestic commerce within the State of Texas in the purchase and sale of oils;

neither has it manufactured any oils in the State of Texas,
58 nor has it purchased its supplies within the State of Texas,

but its dealings, as within the State of Texas, have been, as aforesaid, by way of purchase in other States of the American Union and causing its oils to be shipped into the State of Texas and there sold in unbroken packages. This defendant corporation therefore says that it has been engaged, in so far as its operations in the State of Texas are concerned, exclusively in interstate commerce; and this defendant here now denies the authority and jurisdiction of the State of Texas or of the courts of Texas or any other branch of the State government of Texas to interfere with it in the conduct and control of its lawful business by way of interstate commerce, as aforesaid, within the State of Texas, and says that jurisdiction over said commerce, under the Constitution and laws of the United States, obtains exclusively with the Government of the United States of America and not with the State of Texas; and this the defendant is ready to verify, and of which it puts itself upon the country.

3. And for further answer and defense in this behalf comes The Waters-Pierce Oil Company and the other defendants named herein and say that ever since the incorporation of said defendant company, The Waters-Pierce Oil Company, the business and affairs of said company have been controlled exclusively by its directors and corporate officers and agents and not in any manner whatsoever by the trustees of the Standard Oil trust. These defendants expressly deny that the Waters-Pierce Oil Company ever in any manner, directly or indirectly, became a party to said trust agreement, and they deny expressly that since the 6th day of July, 1889, or since any other day, the Waters-Pierce Oil Company, by and through the other defendants named and its numerous local agents in the State of Texas, have in any manner observed, performed, and carried out the purposes, objects, and policies of said trust agreement as set forth in plaintiff's petition. The Waters-Pierce Oil Company and

the other defendants say that it is true that said company has
59 established at various localities in the State of Texas warehouses, tanks, and other depositories and places for the storage and reception of its oils, and that said company ships its oils into the State of Texas, consigned to its managers and other agents, and said oils are stored in the receptacles from which they are sold in said State of Texas to merchants and others dealing therein, in such quantities as the buyer desires to purchase, by such managers and agents; and the Waters-Pierce Oil Company expressly denies that since the date of said permit issued by the State of Texas to said company to do business in said State it began acting in pursuance of said trust agreement or began carrying out, observing, and performing its purposes and objects, as stated in plaintiff's petition,

or that it has observed, performed, or carried out said trust agreement and the purposes, policies, and objects as set forth by plaintiff in its petition. The Waters-Pierce Oil Company says it may be true that some of the owners and holders of shares in its capital stock may, upon their own personal account, have entered into said trust agreement, and it may be true that some of these shares have been transferred on the books of the defendant corporation to certain persons connected with said trust, but no part of defendant's shares, so far as defendant is advised, have been entered upon the books of defendant company in the name of the Standard Oil trust, nor by name to any trustees of the Standard Oil trust, and it may also be true, as alleged by plaintiff, that the trustees of the Standard Oil trust have purchased other chares of the defendant company and now hold the same, but these defendants deny expressly that the trustees of the Standard Oil trust, or any person or persons for them in their behalf, have ever held or controlled or have they exercised in any manner a supervising and controlling authority and power over the affairs of the said Waters-Pierce Oil Company or the management, conduct, and control of its business, or have ever controlled the action of defendant corporation in the
60 selection of its officers and directors or in the conduct and management of its business in the State of Texas. The Waters-Pierce Oil Company further says that it is true it has never taken any corporate action or made any complaint against said stockholders signing said trust agreement, nor against those of its shareholders who may have surrendered or sold their stock in said company to said nine trustees of the Standard Oil trust, nor has it taken any action against any of its shareholders, if such there be, who ever received Standard Oil certificates which were issued and delivered to them in exchange for the shares of defendant's stock, for the reason, as defendant corporation is advised, it as a corporation was powerless under the law to take any action, even if such action was necessary, which is not admitted but denied, against any of such shareholders for the sale and transfer of their individual property and holdings in defendant company, over which transactions the defendant company could have no control; and if this defendant corporation has acquiesced in such transfer and exchange, if such transfers and exchanges have been made, it acquiesced because there was no legal remedy known to said corporation whereby it was authorized to interfere in any manner in the disposition of the shares of its stock held by the shareholders after issuance and delivery of such shares to said shareholders and their payment for the same, in accordance with the laws of the State of Missouri. These defendants deny expressly that the defendant company, The Waters-Pierce Oil Company, either directly or through their employés, managed the business of said defendant company so as not to conflict with the policy fixed from time to time by the trustees of the Standard Oil trust but these defendants say, to the contrary, that there have been frequent conflicts by this defendant company with the transactions and policies of said Standard Oil trust while the same was in existence. These defendants further deny expressly

that the Waters-Pierce Oil Company conforms its corporate action to the policy fixed by the trustees of the Standard Oil trust or
61 that it pursues, carries out, and executes the purposes and objects of said trust. They admit that the Waters-Pierce Oil Company conducts and carries on its business in southwestern Missouri, Arkansas, Texas, Indian Territory, and Oklahoma Territory, in the United States, and it admits that it does not sell oils in any other portion of the United States, but these defendants say that it has come and does come in active competition with the various companies heretofore composing the Standard Oil trust in the Republic of Mexico, and that it has met competition on the part of said companies heretofore composing the Standard Oil trust in certain portions of its territory in the United States, as above set forth. These defendants deny that in the market of Texas there is no competition in the sale of oils or petroleum, but they aver the truth to be that active competition in the sale of petroleum oils and their products has been going on for many years in the State of Texas and now exists, and that petroleum oils have been shipped and sold constantly in the State of Texas for twenty years past by corporations, firms, and individuals outside of the State of Texas, and who have never been in any manner connected with the Standard Oil trust, and persons, firms, and corporations are constantly shipping oils into the State of Texas and selling the same in competition with the Waters-Pierce Oil Company at the time of the filing of this answer; and so these defendants say that the Waters-Pierce Oil Company has not monopolized and does not monopolize trade in petroleum and its products in Texas, and while, by reason of the facilities for handling oils possessed by the Waters-Pierce Oil Company, and which have necessitated an investment on the part of the Waters-Pierce Oil Company within the State of Texas of a large sum of money, to wit, the sum of five hundred thousand dollars ($500,000), the Waters-Pierce Oil Company does control a great portion of the trade in petroleum and its products in Texas, yet such control does not arise from the causes and reasons stated
62 in plaintiff's petition, but solely because of the exercise by the Waters-Pierce Oil Company of superior business acumen, proper amount of capital invested, and skillful handling of its business, whereby it is able to do and does accord to the public and to consumers better oil at cheaper rates than can be done or is done by any of its competitors; and this the defendants are ready to verify, and of which they put themselves upon the country.

4. Further answering in this behalf, these defendants come and say that they are advised and believe that the allegations in plaintiff's petition as to the formation of the Standard Oil trust agreement entered into in the city of New York on the 2nd day of January, A. D. 1882, by and between the persons, firms, and corporations named in said petition is true. These defendants are advised that on the day last named, to wit, the 2nd day of January, A. D. 1882, such an agreement was entered into in the city and State of New York, but they deny expressly that the Waters-Pierce Oil Company ever became in any manner, directly or indirectly, a party to said

agreement; and they further deny that the purposes and objects of said trust agreement were unlawful at the time the same was executed and entered into. These defendants are advised and believe that thereafter, to wit, on March 21st, 1892, a meeting of the shareholders of the Standard Oil trust was held in the city of New York and State of New York in pursuance of the terms of the original trust agreement, duly called for the express purpose of voting upon a resolution to terminate said trust agreement in accordance with the terms of said agreement, and to take such further action as might be rendered necessary, at which said meeting resolutions were duly adopted by unanimous vote of all the shareholders of said trust agreement to the effect that the agreement entered into on January 2nd, A. D. 1882, commonly known as the Standard Oil trust agreement, and the supplement thereto, dated January 4th, 1882, should be and was then and thereby terminated on said 21st day of
63 March, A. D. 1892, and that the affairs of the trust should be wound up by certain persons therein named, and all property held by said trust, except stocks of corporations, should be sold by said trustees at private sale, and the proceeds thereof, together with any money belonging to the trust, should be distributed to the owners of trust certificates according to their respective interests. These defendants say that in pursuance of said resolutions, which were accompanied by other resolutions not necessary to be herein specifically set forth, but which will be offered in evidence on the final trial of this case, said trust agreement of 1882 was terminated, and that since said date the affairs of the Standard Oil trust have been in process of liquidation and administration under the laws of the State of New York, where the home office of said trust has always been located. These defendants say that at the time of the institution of this suit, charging the defendant The Waters-Pierce Oil Company with being a member of the Standard Oil trust, there was no such trust in existence, and the same had been duly dissolved and determined more than three years before the filing of this suit by the State of Texas; and this these defendants are ready to verify, and of which they put themselves upon the country.

5. And for a further answer in this behalf comes the defendant The Waters-Pierce Oil Company and expressly denies that it, said Waters-Pierce Oil Company, ever entered into any agreement, contract, or understanding, or ever authorized any other person for it and in its behalf to enter into any agreement, contract, or understanding of any nature or character whatsoever with the persons mentioned in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19 of plaintiff's said first amended original petition. The defendant The Waters-Pierce Oil Company says that if any contracts, arrangements, or understandings such as are set forth and alleged in said above-named paragraphs of plaintiff's petition were ever entered into by the respective parties therein named, citizens of Texas,
64 with any one representing or purporting to represent the Waters-Pierce Oil Company, either as agent, attorney, employé, servant, or otherwise, such arrangement, contract, or understanding was never known to the defendant The Waters-Pierce Oil

Company, nor did it, the Waters-Pierce Oil Company, ever sanction such arrangement; nor did it, the Waters-Pierce Oil Company, ever agree in any manner, by acquiescence or otherwise, directly or indirectly, with any such agreement, contract, or understanding as set up by plaintiff in said paragraphs; and this the defendant The Waters-Pierce Oil Company is ready to verify.

And these defendants, having answered fully plaintiff's first amended petition herein filed, come now and pray the court that upon final trial it may please the court to order, adjudge, and decree that plaintiff, The State of Texas, take nothing by its suit, and that these defendants go hence without day, and with all their costs in this behalf most wrongfully sustained.

JOHN D. JOHNSON,
CLARK & BOLINGER,
Attorneys for All the Defendants.

(Endorsed:) 12589. The State of Texas *vs.* Waters-Pierce Oil Co. *et al.* 1st amended original answer. Filed June 2nd, 1897. Jas. P. Hart, clerk.

Judgment.

June 15th, 1897.

THE STATE OF TEXAS
vs.
WATERS-PIERCE OIL COMPANY. } 12589.

65 Now, on this the 15th day of June, A. D. 1897, came on to be heard this cause, and both parties having appeared and announced ready for trial, there was then and there presented to the court the general and special exceptions of defendant to plaintiff's first amended original petition; and the court, after hearing argument of counsel, considers that said exceptions are not well taken, and—

It is therefore ordered that said general exceptions and all of said special exceptions be, and the same are hereby, overruled; to which the defendant excepts; and then came on the cause to be further heard, and came a jury of good and lawful men, to wit, W. T. McGregor and eleven others, who, being duly empannelled and sworn and who, after hearing the pleadings read and after hearing the evidence and argument of counsel and receiving the charge of the court, retired to consider of their verdict and returned into court the following verdict:

"AUSTIN, TEXAS, *June 15th*, 1897.

We, the jury, find for the plaintiff, The State of Texas, against the defendant Waters-Pierce Oil Company and in favor of the individual defendants Hathaway, Austin, Grice, Keenan, and Fries.

W. T. McGREGOR, *Foreman.*"

It is therefore ordered, adjudged, and decreed by the court that the defendant The Waters-Pierce Oil Company be, and is hereby, denied the right and prohibited from doing any business within

this State, and that its permit to do business within this State heretofore issued on July 6th, 1889, by the secretary of state of this State be, and the same is hereby, cancelled and held for naught, and that said defendant, The Waters-Pierce Oil Company, its managers, superintendents, agents, servants, and attorneys, be, and are hereby, perpetually enjoined and restrained from doing business within this State.

Nothing herein shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State.

It is further ordered that the plaintiff, The State of Texas,
66 recover of the said defendant, The Waters-Pierce Oil Company, all costs in this behalf incurred, for which let execution issue.

It is further ordered that the clerk of this court shall issue all necessary papers to enforce this judgment.

It is also ordered that the defendants E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries go hence without day, and that plaintiff take nothing as to said defendants, and that they recover of plaintiff their costs in this behalf expended.

Charge of the Court.

Filed June 15th, 1897.

In District Court of Travis County, Texas, for 26th District, May Term, 1897.

THE STATE OF TEXAS
vs.
WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

(1.)

GENTLEMEN OF THE JURY: This is a suit by The State of Texas, as plaintiff, against The Waters-Pierce Oil Company, a private corporation, and E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, as defendants, to cancel the permit of said Waters-Pierce Oil Company to do business in this State and to enjoin all of said defendants from further transacting the business of said company in this State on account of an alleged violation of the laws of this State against trusts by said company, its agents and employees.

(2.)

The plaintiff alleges that the defendant Waters-Pierce Oil Company is a private corporation, incorporated under the laws of the State of Missouri for the purpose of dealing in petroleum
67 and its products and in selling the same in the State of Missouri and other States, and that on July 6th, 1889, said company filed its articles of incorporation in the secretary of state's office, in this State, and secured a permit to transact its said busi-

ness in the State of Texas for a term of ten years, as provided by the laws of this State, and that since said date defendant company has been transacting its said business in this State and has divided this State into five general divisions for the purpose of transacting its said business, and that the defendants E. T. Hathaway, F. A. Austin, William Grice, J. W. Keenan, and Lewis Fries are the respective managers of defendant company in said general divisions of this State and have appointed various local agents throughout this State for the transaction of its business.

(3.)

Plaintiff further alleges that the defendant company has violated the law of this State against trusts by making and entering into a contract with and becoming a member of the Standard Oil trust, which contract and agreement is set out in full in plaintiff's petition, and for doing certain other acts in connection with said Standard Oil trust agreement.

(3½.)

Plaintiff also alleges that the defendant company has violated the law of this State against trusts by entering into a contract with the Eagle Refining Company, with C. W. Robinson, with J. L. Lewis, and Stillwell Bros., as set out in the plaintiff's petition and introduced in evidence before you.

(4.)

Plaintiff further alleges that since July 6th, 1889, said defendant company has been and still is engaged in dealing in and selling the products of petroleum in this State, and that during that time said company has made and is still making through its agents in this State contracts and agreements by and between said company and other parties dealing in, buying, and selling similar oils in
68 this State, by the terms of which agreements said parties, for a valuable consideration paid them by defendant company, agreed and contracted that they would not buy any oils from any other person or corporation, but would deal with and buy and sell oils obtained from said defendant company exclusively; that said company has further contracted with certain of said persons, as aforesaid, for a valuable consideration paid by defendant company to said parties, by the terms of which said parties contracted and agreed to buy from and sell the oils of defendant company exclusively, and not to sell the oils so bought, as aforesaid, to any one buying from or dealing with any other person or corporation dealing in such oils in competition with said defendant company; and, further, that said company since July 6th, 1889, had made and entered into other contracts and agreements by and between it and various others dealing in and buying and selling oils, by the terms of which said parties agree with said company to purchase its said oils and to sell the same to others desiring to purchase the same at prices fixed and established by it or its agents and officers. The names and dates and contracts above referred to are set out in plaintiff's petition.

(5.)

Plaintiff further alleges that prior to July 6th, 1889, and also since that date, the defendant company entered into certain contracts in writing, with certain parties in Brownsville, Texas, by the terms of which said parties bound themselves to buy all their oil from defendant company for a fixed period in consideration of certain rebates allowed them by defendant company, and also agreed to sell such oil at a price fixed by defendant company, and that such contracts as were entered into prior to 1889 have been carried out and executed and business done thereunder by said parties since that date to the present time. The parties with whom said contracts were made and the terms thereof are set out in plaintiff's petition.

69 (6.)

Plaintiff alleges that all of said contracts above mentioned were made by the agents of said defendant company, and were authorized by it, and were fully ratified and carried out by it after same had been so made, and that the same were a violation of the laws against trusts of this State; that the products of petroleum are articles of prime necessity to the people of this State, and that by reason of said acts and contracts said defendant company has forfeited its right to transact business in this State, and prays for an injunction prohibiting the defendant company, its agents and employés, from violating said statute, and for a decree cancelling the permit of said company to do business in this State.

(7.)

The defendants answer- by a general denial of all the allegations of plaintiff's petition, and especially answer- that the Waters-Pierce Oil Company is the real defendant in this action, and that the other parties named as defendants are simply its agents in the State of Texas.

It further says that the State of Texas is estopped from cancelling defendant's permit to do business in this State, because that on July 6th, 1889, through its proper officers and in pursuance of the provisions of the law of this State, did, for a sufficient and lawful consideration, issue to said company a permit to do business in this State for a term of ten years from that date, and that said permit was a valid and binding contract between it and the State of Texas.

(8.)

Defendant further pleads that it is a foreign corporation of the State of Missouri, having its principal office in said State of Missouri, and that the business transacted by it in the State of Texas was interstate commerce and not subject to the laws of the State of Texas.

Defendant denies that it ever became a member of or a
70 party to the Standard Oil trust agreement, or that it acted with said trust or was controlled by said trust in any way; that said trust was dissolved March 21st, 1892.

Defendant denies that it ever entered into any of the contracts or

agreements with the parties named in plaintiff's petition for the sale of its oils, and that if any such contracts or agreements were entered into, as set forth in plaintiff's petition, with any one representing the defendant company, either as agent, attorney, employee, servant, or otherwise, the same was never known to the defendant company, nor did it ever sanction or ratify such contract, either directly or indirectly; wherefore they pray that plaintiff take nothing by this suit.

(9.)

Upon the law of the case you are instructed as follows:

Under the laws of this State a trust is defined as follows:

A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for either, any, or all of the following purposes:

1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase or reduce the price of merchandise, produce, or commodities.

—. To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of *perchandise*, produce, or commerce intended for sale, use, or consumption in this State.

5. To make or enter into or execute or carry out any contract, obligation, or agreement of any kind or description by which
71 they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

(10.)

Now, if you find from the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying, and selling oils, as named and set out in plaintiff's petition since July 6th, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the de-

fendant company exclusively for any specified time and from no other source, in consideration of rebates allowed them by defendant company or for any other valuable consideration, or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into, and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all their oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, or if said defendant company, so acting since said date, made and entered into and
72 carried out in this State a contract with any of the parties, as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that said contracts had been made, consented to and ratified or carried out the same after they were made, then you are instructed that the defendant would be guilty of violating the law against trusts of this State, and if you so find the facts to be as above stated you will return a verdict for the plaintiff against the defendant Waters-Pierce Oil Company.

(11.)

You are further instructed that a corporation can only act through its agents and servants, but a corporation is not liable for all the acts of its agents or servants. It is liable, however, for the acts of its agents done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents which have been acquiesced in or ratified by the governing body of said corporation.

(12.)

Now, if you find from the evidence that any or all of the contracts mentioned in section No. 10 of this charge were made and carried out by the defendant company, acting through its agents, with the parties therein named, but you do not find that said agents
73 were authorized by the governing body of said corporation to make said contracts, nor that said contracts were made in

the scope of the duty and employment of such agents, and do not find that said contracts, if any were made, were known to or acquiesced in or consented to by the governing body of said corporation after being made by said agents, then you will return a verdict for the defendant company.

(13.)

But if you find said contracts mentioned in section No. 10 of this charge were entered into by the defendant company, acting through its agents, and that said agents were acting in the scope of their employment and agency in making said contracts, or if said contracts were not authorized by the governing body of said corporation, that it acquiesced in or consented to or ratified said acts after knowing the same had been entered into, then said defendant company would be liable for such acts.

(14.)

You are further instructed that this court has no jurisdiction over and the laws of this State do not apply to interstate commerce—that is, to commerce between the different States of the United States. Shipments of oils or other products made by the Waters-Pierce Oil Company from points without this State to its agents within this State is interstate commerce until such oils are sold by said company in the original packages in which it was shipped into this State, and as such is not subject to the laws of this State regulating the sale thereof, and if the evidence introduced before you shows any of the contracts set out in plaintiff's petition were made in reference to interstate commerce, then you will not consider such contracts further as the laws of this State do not cover such transactions; but, on the other hand, if the Waters-Pierce Oil Company shipped oils from points beyond this State to its agents to points within this State, and after their receipt
74 in this State the same were sold by said agents in this State to parties in this State, in broken packages or by retail, and not in the original packages in which said oils were shipped into this State, then such business is not interstate commerce and is subject to the laws of this State. You are further instructed that, even though the contract may have reference to interstate shipments of oils, yet if the parties go farther and contract that such oils after being sold by said Waters-Pierce Oil Company to parties in this State shall be sold by said parties at a price fixed by the duly authorized agents of defendant company, then you are informed that such dealing with said oils after its sale to parties in this State is not protected by the interstate-commerce laws, but such contracts, if made, are subject to the laws of this State.

(15.)

You are instructed that the law against trusts in this State became a law on March 30th, 1889, and was amended in 1895, and the defendant company obtained its permit to do business in this

State on July 6th, 1889, and all transactions in evidence before you of date prior to July 6th, 1889, are immaterial in this case, except where such contracts were continued and carried out subsequent to July 6th, 1889, and for the purpose of showing the course of dealing of said company in this State, and such transactions prior to July 6th, 1889, are no ground for forfeiture of defendant's permit to do business.

(16.)

There has been certain evidence introduced before you tending to show efforts and inducements offered by agents of the defendant company to parties to handle oils of defendant company exclusively and tending to show refusal of the agents of said company to sell parties handling other oils than those of defendant company, and of discrimination in prices against parties handling other oils than those of defendant company, and of cutting of prices by defendant Co. to break down competition. None of these things are
75 unlawful, and was only admitted as bearing upon the question of the course of dealing of defendant company in this State and as bearing upon the question whether or not the defendant company made or entered into the contracts or any of them, as set out and mentioned in section No. 10 herein, and as to whether or not such contracts or course of dealing, if any such there was, was known to the governing officers of the defendant company or was authorized by them.

(17.)

There has been introduced in evidence before you a certain contract, known as the Standard Oil trust agreement, and certain evidence tending to show that the defendant Waters-Pierce Oil Company became a member of and entered into said agreement. You are instructed that the evidence is not sufficient to show that defendant became a member of said organization, if at all, in a manner that violates the trust laws of this State, and you will therefore disregard all testimony upon this branch of the case.

(18.)

There has also been introduced in evidence before you certain evidence in regard to a contract made by the defendant company with the Eagle Refining Company, and also with C. W. Robinson, with J. L. Lewis and Stillwell Bros., in the State of Texas, by which they purchased the business of such concerns. You are instructed that such transactions as these are not believed to be in violation of the laws of this State, and the evidence in regard to these transactions will only be considered by you as bearing upon the course of dealing of defendant company in this State.

(19.)

The questions for you to determine in this case are:

(1.) Were any of the contracts mentioned in section 10 of this charge made and entered into and carried out by the defendant

company in this State since July 6th, 1889, acting through its agents?

(2.) Whether such agents were acting in the scope of their
76 authority and employment in making such contracts, or, if not, whether same were ratified or acquiesced in by defendant company after they were so made.

(3.) Whether said contracts, if any, relate to interstate commerce or to business within this State.

(20.)

In determining whether or not the agents of defendant company were authorized to make the contracts alleged, if any were so made, or whether same were known to or acquiesced in by defendant company's governing officers, the same does not necessarily have to be shown by positive or direct testimony, but may be shown by circumstances, and you will take into consideration all the facts and circumstances in evidence before you in determining this question.

(21.)

You will return a verdict for the defendants Hathaway, Austin, Grice, Keenan, and Fries, as they are only the agents of defendant company and not liable in this suit. If you find a verdict for the plaintiff you will say:

"We, the jury, find for the plaintiff, The State of Texas, against the defendant Waters-Pierce Oil Company and in favor of the individual defendants," naming them. If you find for the defendant company you will say:

"We, the jury, find for all the defendants, and that plaintiff take nothing by this suit."

(22.)

The burden of proof is on the plaintiff to show by a preponderance of the evidence the facts necessary to entitle it to recover.

(23.)

The jury are the exclusive judges of the credibility of the witnesses, the facts proven, and the weight to be given the testi-
77 mony, but are bound to receive the law from the court and be governed thereby.

R. E. BROOKS,
Judge 26th Judicial District.

(Endorsed:) No. 12589. The State of Texas *vs.* Waters-Pierce Oil Company *et al.* Charge of the court. Filed June 15th, A. D. 1897. Jas. P. Hart, clerk D. C., T. Co., Texas.

Plaintiff's Special Charge No. 1, Refused.

Filed June 15th, 1897.

In District Court of Travis County, Twenty-sixth Judicial District.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL CO. } No. 1.

Plaintiff, The State of Texas, asks the following special charge:

GENTLEMEN OF THE JURY: You are instructed that the contract entered into between the Waters-Pierce Oil Company, upon the one part, and the Eagle Refining Company, A. W. Clem, S. S. Drake, A. D. Carpenter, W. A. Smith, and W. H. K. Rose and read in evidence in this case is an illegal combination of the acts of said parties in restraint of trade, and you will return a verdict in this case in favor of the plaintiff upon said issue.

M. M. CRANE,
T. A. FULLER,
Att'ys for Plaintiff, The State of Texas.

Refused.
R. E. BROOKS,
Dist. Judge.

78 (Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Plaintiff's special charge No. 1, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Plaintiff's Special Charge No. 2, Refused.

Filed June 15th, 1897.

In District Court of Travis County, Twenty-sixth Judicial District.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL CO. } No. 2.

Plaintiff, The State of Texas, asks the following special charge:

GENTLEMEN OF THE JURY: You are instructed that the contract entered into between the Waters-Pierce Oil Company, upon the one part, and C. W. Robinson, upon the other part, introduced in evidence in this case, is a combination of the acts and skill of said Waters-Pierce Oil Company and said C. W. Robinson, and is unlawful and illegal and in restraint of trade, and you will find for the plaintiff upon said issue.

M. M. CRANE,
T. A. FULLER,
Att'ys for Plaintiff, The State of Texas.

Refused.
R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Plaintiff's special charge No. 2, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

79 *Plaintiff's Special Charge No. 3, Refused.*

Filed June 15th, 1897.

In the District Court of Travis County, Twenty-sixth Judicial District.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL CO. } No. 3.

Plaintiff, The State of Texas, asks the following special charge:

GENTLEMEN OF THE JURY: If you believe from the evidence that a majority of the shareholders of the Waters-Pierce Oil Company entered into the agreement introduced in evidence before you, and known as the Standard Oil trust agreement, and that said Waters-Pierce Oil Company was managed and controlled by the trustees of said Standard Oil trust provided for in said agreement, and that said Waters-Pierce Oil Co. afterwards entered into or carried on business in the State of Texas, dealing in illuminating oils, and carried on said business within said State under common agreement and supervision of said trustees mentioned in said Standard Oil trust agreement, and that by virtue of said agreement and in pursuance thereof the said Waters-Pierce Oil Company has done business in the State of Texas as a member of said trust since the 30th day of March, 1889, then you will return a verdict in favor of the plaintiff, provided, however, that said Standard Oil trust agreement was not in good faith abrogated and abandoned in the year 1892; but if you should find from the evidence that, notwithstanding the resolution of the shareholders of the Standard Oil trust introduced to you in evidence, that all the members of said Standard Oil trust agreement have continued to pursue and carry out said agreement as originally entered into, then you will find
80 for the plaintiff; but if you should find from the evidence that said trust agreement was in good faith abrogated and abandoned by the parties thereto, including the Waters-Pierce Oil Company and its shareholders, and that business has not been carried on in the State of Texas by said Waters-Pierce Oil Company in pursuance thereof, you will find for the defendant upon this issue.

M. M. CRANE,
Att'y Gen., &
T. A. FULLER, *Assistant,*
Att'ys for Pl'ff.

Refused.
R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Plaintiff's special charge No. 3, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 1, Refused.

Filed June 15th, 1897.

THE STATE OF TEXAS
vs.
WATERS-PIERCE OIL CO. ET AL. } 12589. On Trial Dist. Ct., 26th Dist., at Austin.

The jury are instructed that the acts of the legislature of the State of Texas approved respectively on March 30th, 1889, and April 30th, 1895, known as the anti-trust acts, and upon which this prosecution is based, are contrary to the Constitution of the United States and of the State of Texas and therefore null and void. The jury will therefore return their verdict in favor of defendants.

81 Counsel for defendants request the above instruction.

JNO. D. JOHNSON,
CLARK & BOLINGER,
Att'ys for Def'ts.

Refused.
R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State *v.* Waters-Pierce Oil Co. Def'ts' charge No. 1, refused. Filed June 15th, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 2, Refused.

Filed June 15th, 1897.

STATE
vs.
WATERS-PIERCE OIL CO. } No. 12589. Charge No. 2.

The jury are instructed that in the case on trial it is not to be presumed by them in arriving at a verdict that the Waters-Pierce Oil Company authorized or directed its agents, or any of them, to violate the laws of this State in their dealings with its citizens. A corporation is not responsible for every wrong committed in its name, and before finding against the defendant, The Waters-Pierce Oil Company, for any unlawful acts done by an agent of said company, if the jury find that such unlawful acts have been so done, the jury must also find from a preponderance of the evidence that such unlawful acts were done through the procurement of the company or with its knowledge or assent; otherwise the jury will find for defendant company.

Refused.
R. E. BROOKS,
Dist. Judge.

82 (Endorsed:) 12589. State *vs.* Waters-Pierce Oil Co. Def'ts' chg. No. 2, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 3, Refused.

Filed June 15th, 1897.

STATE
vs.
W. P. O. Co. ET AL. } 12589. Charge No. 3, by Def'd'ts.

The jury are further instructed that in law, if any agent's authority is capable of being executed in a lawful manner, such authority is not to be extended by construction so as to embrace acts prohibited by law and so as to render the principal liable to a penalty or forfeiture. The proof must show that the principal either authorized the agent to commit the unlawful act or that, having knowledge of such act, the principal connived at or acquiesced therein.

If, therefore, the jury should find from the evidence that any of the agents or servants of the Waters-Pierce Oil Company in their transactions in this State have been guilty of violations of the laws of this State in relation to conspiracies and combinations against trade, yet notwithstanding this, before they can find against the Waters-Pierce Oil Company, they must find from the evidence alone that the Waters-Pierce Oil Company, through its governing officers and corporate authority, either directed or authorized the commission of such unlawful act by the agent or that it had knowledge of such unlawful act and acquiesced in or approved the same.

And unless the jury so find from the evidence, they will find for the defendant Waters-Pierce Oil Co.

83 Defendants request the foregoing instruction.

JOHNSON & CLARK,
Att'ys for Def'd'ts.

Refused.
R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State *v.* Waters-Pierce Oil Co. Def'ts' charge No. 3, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 4, Refused.

Filed June 15th, 1897.

STATE
vs.
W. P. O. Co. ET AL. } 12589. Charge No. 4, by Def'd'ts.

As a general rule of law, a corporation is not liable for the criminal acts of its agents, and in order to subject it to such a liability it must be shown that it procured, authorized, or directed the agent in the commission of an act violative of law or knew of and sanctioned such violation before its commission. A principal cannot

by mere subsequent ratification of an act of an agent done in violation of law subject himself to penalty, nor can a corporation ratify a transaction of its agent when such transaction is prohibited by positive law.

If, therefore, the jury should find from the evidence that any of the agents of the Waters-Pierce Oil Company in their transactions in this State have violated the laws of this State by entering into contracts or agreements with any citizen or citizens of this State whereby the prices of illuminating oils to be sold to consumers were fixed at a certain figure, or that such agents of the Waters-
84 Pierce Oil Company in their said transactions have been guilty of other violations of the trust laws of this State, yet before the jury can find the Waters-Pierce Oil Co. guilty as a participant in such acts and liable to the penalty of forfeiture of its right to do business in this State by reason thereof the evidence must establish to the satisfaction of the jury that the Waters-Pierce Oil Company procured, authorized, or directed such agent or agents to commit such violations of law or knew of and sanctioned such violations of law by its agents before their commission, and such authority or direction and sanction must have come from the governing body and authority of the Waters-Pierce Oil Company and not from some other subordinate agent or authority, and unless the jury find from the evidence alone that the Waters-Pierce Oil Company, through its governing body or authority, procured, directed, or sanctioned the commission of such unlawful acts by the agents of said corporation, if any such were committed, the jury will find for defendant The Waters-Pierce Oil Company, no matter what may be their finding against such agent personally.

Defendants request the foregoing instruction.

JOHNSON & CLARK, *Att'ys.*

Refused.

R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State *v.* Waters-Pierce Oil Co. Def'ts' chg. No. 4, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 5, Refused.

Filed June 15th, 1897.

STATE *vs.* W. P. O. Co. } 12589. Charge No. 5, Asked by Defendants.

85 The jury are instructed that the uncontradicted evidence shows that the transactions between the Waters-Pierce Oil Company and certain citizens of Brownsville, Texas, related to and concerned only the matters of interstate commerce, which are not embraced within the laws of this State.

The jury will therefore discard such transactions from their further consideration.

Defendants request the foregoing instruction.

JOHNSON & CLARK, *Att'ys.*

Refused.

R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State *v.* Waters-Pierce Oil Co. Def'ts' charge No. 5, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 6, Refused.

Filed June 15th, 1897.

STATE *vs.* W. P. O. Co. } 12589. Charge No. 6, Asked by Defendants.

The jury are instructed that if they, upon all the evidence, entertain a reasonable doubt as to the knowledge and participancy of the Waters-Pierce Oil Company as a corporation with any unlawful acts on the part of any agent or agents of said corporation, as charged in the petition (if any such acts were committed), then it will be the duty of the jury to find in favor of the defendant, Waters-Pierce Oil Co.

Defendants request the foregoing instruction.

JOHNSON & CLARK, *Att'ys.*

86 Refused.

R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State *vs.* Waters-Pierce Oil Co. Def'ts' charge No. 6, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Defendants' Special Charge No. 7, Refused.

Filed June 15th, 1897.

The court charges the jury that under the pleading and the evidence in this case they must find a verdict for defendants.

We request the above instruction.

GEO. CLARK &
J. D. JOHNSON,
Att'ys for Def'ts.

Refused.

R. E. BROOKS,
Dist. Judge.

(Endorsed:) 12589. State *v.* Waters-Pierce Oil Co. Def'ts' charge No. 7, refused. Filed June 15, 1897. Jas. P. Hart, clerk.

Bill of Exceptions No. 1.

Filed June 23rd, 1897.

In District Court, 26th Judicial District, State of Texas.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

Defendants' bill of exception No. 1.

Be it remembered that upon the trial of the above numbered and entitled cause, to wit, at a regular term of the above-named
87 court begun and holden at the court-house, in Travis county, in the city of Austin, Texas, on the first Monday in May, A. D. 1897, said trial being begun and had in said court on Saturday, June 5, 1897, upon the call of said cause for trial, and after announcement of ready for trial by both parties, plaintiff and defendants, the defendants then and there presented their several demurrers to plaintiff's petition, all of which demurrers are set forth in the record, which demurrers were argued by counsel and considered by the court, and thereafter, to wit, on Tuesday, June 8, 1897, said demurrers were in all things overruled by the court; to which ruling of the court the defendants, by counsel, then and there excepted and had their exceptions duly noted, and here now, during the term of said court, present this their formal bill of exception to said action and ruling of the court, and ask that the same may be signed and made a part of the record in this cause, which here in open court is accordingly done.

R. E. BROOKS,
District Judge, 26th Judicial District.

(Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co' Bill of exceptions No. 1. Filed June 23rd, 1897. Jas. P. Hart, clerk.

Bill of Exceptions No. 2.

Filed June 23rd, 1897.

In District Court, 26th Judicial District, State of Texas.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

Defendants' bill of exception No. 2.

Be it remembered that upon the trial of the above numbered and entitled cause, at the May term, A. D. 1897, in the above-named court, to wit, on June 15th, 1897, and upon the conclusion of the testimony adduced by both parties, plaintiff and defendants,
88 the court delivered its written charge to the jury, which charge is incorporated in the record, and to which reference

is here made; and thereupon the defendant, by counsel, excepted to said charge upon the following grounds, to wit:

1. Because it was error in the court to instruct the jury, as set forth in paragraph 11 of the charge, to the effect that a corporation is liable for the acts of its agents done in the scope of their employment and agency, because such charge was not applicable to the case on trial nor to the facts of this case, in that said charge was pertinent only in a civil cause in a controversy between a corporation and a private person for wrongful and tortious acts of its agents done within the scope of their employment, and not in a suit for forfeiture of the charter of a corporation, as in the case at bar.

2. Because the court further erred in paragraph 13 of said charge in instructing the jury in substance that the defendant corporation was bound by the acts of its agents, if said agents were acting in the scope of their employment and agency, in making certain contracts violative of the laws of the State of Texas, the law being to the contrary—that is to say, that the agent only is personally liable for a transaction made by him in violation of law, and it is not to be presumed that contracts in violation of law are authorized by the governing body of any corporation, and especially in the case at bar. The evidence was wholly wanting as to any authority on the part of the defendant corporation authorizing any such violations of law by contract on the part of its agents, if any such violations were made; but, to the contrary, the evidence was uncontradicted that, if such violations of law were had and done by the agents of the defendant company, such acts and transactions of the agent or agents were unknown to the defendant company, and because in law, when an illegal contract is entered into by the agent of a corporation, such corporation is not concluded by acquiescence therein, nor can such corporation ratify said ille-
89 gal acts of its agents after the same are had and done.

3. Because the court further erred in paragraph 16 of its charge by instructing the jury in substance that certain evidence tending to show efforts and inducements offered by agents of the defendant company to parties to handle oils of the defendant company exclusively and tending to show refusal of agents of said company to sell to parties handling other oils than those of the defendant company and the discrimination of prices against parties handling other oils than those of the defendant company to break down competition were admitted in evidence, not because such acts were unlawful or violative of the laws of the State of Texas, but were only admitted as bearing upon the question of the course of dealing of the defendant company in the State of Texas, and as bearing upon the question whether or not defendant company made or entered into the contracts or any of them, as set out and mentioned in paragraph 10 of said charge, and as to whether or not such contracts or course of dealing was known to the governing officers of the defendant company or was authorized by them. Such proof did not tend to establish any such facts or conclusions as stated by the court, and there was manifest error in the court in

commenting thereon, directing the attention of the jury thereto in manner and form as set forth in said paragraph 10 of the charge.

4. Because the court further erred in paragraph 20 of said charge by instructing the jury in substance that they, the jury, in determining whether or not the agents of defendant company were authorized to make the contracts alleged, if any were so made, or whether same were known to or acquiesced in by defendant company's governing officers, that it was not necessary for such authority to be shown by positive or direct testimony, but it might be shown by circumstances, and that the jury would take into consideration all the facts and circumstances in evidence before them in determining as to this question. This portion of the charge gave an unbridled license to the jury to find a verdict upon
90 mere suspicion or presumption, and in the face of positive and direct testimony on the part of defendant company, uncontradicted, that if any illegal or unauthorized contracts were made by the agent of defendant company in the State of Texas, such contracts were not known to the defendant company, and that by the terms of the charge in this particular the jury were authorized to disregard this positive testimony, and to find their verdict upon mere suspicion.

5. Because it was error in the court to charge as the court did in paragraph 10 of its charge, instructing the jury in substance and effect that if the defendant company entered into or formed a contract in this State with any parties dealing in oils since July 6th, 1889, by the terms of which contract it was agreed that said parties were to buy oils from the defendant company exclusively for any specified time, and from no other cource, in consideration of rebates allowed them by defendant company, because, as shown by the evidence in this case, there was no such contract entered into between defendant company and any citizen or dealer in Texas, because if in fact such contract or pretended contract was entered into by any local agent of the defendant company, such transaction lacked the essential ingredient of mutuality, for that there was no evidence in the record tending to show that defendant company, The Waters-Pierce Oil Company, ever agreed with any party in Texas to sell oils exclusively to such party and to no other person, but, on the contrary, each of said pretended contracts manifested that the Waters-Pierce Oil Company was at liberty at all times to sell its oils to whomsoever it pleased, regardless of any such pretended contract. This portion of the charge was not only erroneous, but was without evidence to support it.

6. Because the court further erred in said paragraph 10 of its charge in instructing the jury to find against the defendant company if said company, acting through its duly appointed and authorized agents, since July 6th, 1889, made, entered into, and carried out a contract in this State with any of the persons
91 named in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all their oils from defendant company and not to buy oils from any other source for any specified time and not to sell

oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, for that such contract or contracts, if entered into, did not show a combination in restraint of trade and a violation of the laws of the State of Texas, for that such pretended contract lacked the essential characteristic of mutuality and was not binding in any manner upon the defendant company, nor does the charge of the court make it necessary that such pretended contract should bind the defendant company, but under the law as given by the court in this regard and in the absence of such mutuality and combination the effect of the charge of the court was to hold this defendant company liable for a contract in restraint of trade, when such alleged contract did not bind the defendant company in any manner whatsoever, nor did such contract show any combination whatsoever between the defendant company and any other person in restraint of trade. Said charge is further erroneous in so far as it instructs the jury that such contract was illegal if it embraced a provision that parties purchasing from defendant company should not sell oils so brought from defendant company to any person handling or dealing in oils in competition with defendant company, in that such transaction, even if made, was not violative of the laws of the State of Texas.

The court overruled said objections to the charge, and thereupon the defendant The Waters-Pierce Oil Company tendered and requested of the court the following special instructions, to wit:

THE STATE OF TEXAS
vs.
WATERS-PIERCE OIL CO. ET AL. } 12589. Charge No. 1. On Trial, District Court, 26th District, at Austin.

92 The jury are instructed that the acts of the legislature of the State of Texas approved respectively on March 30th, 1889, and April 30th, 1895, known as the anti-trust acts and upon which this prosecution is based, are contrary to the Constitution of the United States and of the State of Texas, and therefore null and void. The jury will therefore return their verdict in favor of defendants.

Counsel for defendants request the above instruction.

JOHN D. JOHNSON,
CLARK & BOLINGER,
Att'ys for Def'ts.

Refused.
R. E. BROOKS,
Dist. Judge.

STATE
vs.
WATERS-PIERCE OIL CO. } 12589. Charge No. 2.

The jury are instructed that in the case on trial it is not to be presumed by them in arriving at a verdict that the Waters-Pierce Oil Company authorized or directed its agents or any of them to

violate the laws of this State in their dealings with its citizens. A corporation is not responsible for every wrong committed in its name, and before finding against the defendant The Waters-Pierce Oil Company for any unlawful acts done by an agent of said company, if the jury find that such unlawful acts have been so done, the jury must also find from a preponderance of the evidence that such unlawful acts were done through the procurement of the company or with its knowledge or assent; otherwise the jury will find for defendant company.

Refused.

R. E. BROOKS,
Dist. Judge.

93 STATE *vs.* W. P. O. Co. ET AL. } 12589. Charge No. 3, by Def'd'ts.

The jury are further instructed that in law if an agent's authority is capable of being executed in a lawful manner, such authority is not to be extended by construction so as to embrace acts prohibited by law and so as to render the principal liable to a penalty or forfeiture. The proof must show that the principal either authorized the agent to commit the unlawful act or that, having knowledge of such act, the principal connived at or acquiesced therein. If, therefore, the jury should find from the evidence that any of the agents or servants of the Waters-Pierce Oil Company, in their transactions in this State, have been guilty of violations of the laws of this State in relation to conspiracies and combinations against trade, yet, notwithstanding this, before they can find against the Waters-Pierce Oil Company, they must find from the evidence alone that the Waters-Pierce Oil Company, through its governing officers and corporate authority, either directed or authorized the commission of such unlawful act by the agent, or that it had knowledge of such unlawful act and acquiesced in or approved the same, and unless the jury so find from the evidence, they will find for the defendant Waters-Pierce Oil Company.

Defendants request the foregoing instruction.

JOHN D. JOHNSON,
CLARK & BOLINGER,
Att'ys for Def'ts.

Refused.

R. E. BROOKS,
Dist. Judge.

STATE *vs.* W. P. O. Co. ET AL. } 12589. Charge No. 4, by Def'ts.

94 As a general rule of law, a corporation is not liable for the criminal acts of its agent, and in order to subject it to such liability it must be shown that it procured, authorized, or directed the agent in the commission of an act violative of law, or knew of

nd sanctioned such violation before its commission. A principal annot by mere subsequent ratification of an act of an agent done n violation of law subject himself to penalty, nor can a corporation atify a transaction of its agent when such transaction is prohibited y positive law.

If, therefore, the jury should find from the evidence that any of he agents of the Waters-Pierce Oil Company, in their transactions n this State, have violated the laws of this State by entering into ontracts or agreements with any citizen or citizens of this State, hereby the prices of illuminating oils to be sold to consumers were ixed at a certain figure, or that such agents of the Waters-Pierce Oil Company, in their said transactions, have been guilty of other iolations of the trust laws of this State, yet before the jury can find he Waters-Pierce Oil Co. guilty as a participant in such acts and iable to the penalty of forfeiture of its right to do business in this State by reason thereof, the evidence must establish to the satisfaction of the jury that the Waters Pierce Oil Co. procured, authorized, r directed such agent or agents to commit such violations of law r knew of and sanctioned such violations of law by its agent before their commission, and such authority or direction and sanction nust have come from the governing body and authority of the Waters-Pierce Oil Company and not from some other subordinate gent or authority; and unless the jury find from the evidence alone hat the Waters-Pierce Oil Company, through its governing body r authority, procured, directed, or sanctioned the commission of uch unlawful acts by the agents of said corporation, if any such vere committed, the jury will find for defendant The Waters-Pierce Oil Company, no matter what may be their finding against such agent personally.

5 Defendants request the foregoing instruction.

JOHNSON AND CLARK, *Att'ys.*

Refused.

R. E. BROOKS,
Dist. Judge.

STATE vs. W. P. O. Co. } 12589. Charge No. 5, Asked by Defendants.

The jury are instructed that the uncontradicted evidence shows hat the transactions between the Waters-Pierce Oil Company and ertain citizens of Brownsville, Texas, related to and concerned only natters of interstate commerce, which are not embraced within the aws of this State. The jury will therefore discard such transactions rom their consideration.

Defendants request the foregoing instruction.

JOHNSON AND CLARK, *Att'ys.*

Refused.

R. E. BROOKS,
Dist. Judge.

STATE vs. W. P. O. Co. } 12589. Charge No. 6, Asked by Defendants.

The jury are instructed that if they, upon all the evidence, entertain a reasonable doubt as to the knowledge and participancy of the Waters-Pierce Oil Company as a corporation with any unlawful acts on the part of any agent or agents of said corporation, as charged in the petition (if any such acts were committed), then it will be the duty of the jury to find in favor of the defendant
96 Waters-Pierce Oil Co.

Defendants request the foregoing instruction.

JOHNSON AND CLARK, *Att'ys.*

Refused.

R. E. BROOKS,
Dist. Judge.

STATE vs. WATERS-PIERCE OIL CO. } 12589. Charge No. 7, Asked by Defendants.

The court charges the jury that under the pleading and the evidence in the case they must find a verdict for defendants.

We request the above instruction.

GEO. CLARK AND
J. D. JOHNSON,
Attorneys for Defendants.

Refused.

R. E. BROOKS,
Dist. Judge.

Which special instructions so requested by defendant The Waters-Pierce Oil Company were refused by the court.

To which ruling and action of the court, as well in overruling the exceptions of the defendant The Waters-Pierce Oil Company to the charge as given by the court *and* the refusal of the court to instruct the jury as requested in said seven special instructions so asked by the defendant company, the defendant The Waters-Pierce Oil Company then and there excepted and had its exceptions duly noted, and here now in open court and during the term at which such trial was had the Waters-Pierce Oil Company tenders this its bill of exceptions to said actions and rulings of the court, as
97 aforesaid, and asks that the same may be signed and made a part of the record in this cause, which in open court is accordingly done.

R. E. BROOKS,
District Judge, 26th Judicial District.

(Endorsed.) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Bill of exceptions No. 2. Filed June 23rd, 1897. Jas. P. Hart, clerk.

Bill of Exceptions No. 3.

Filed June 25th, 1897.

In District Court, 26th Judicial District, State of Texas.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

Defendants' bill of exception No. 3.

e it remembered that after the trial of the above numbered and
led cause was concluded in the district court for the 26th judic-l
rict of the State of Texas, to wit, on June 15th, 1897, and after
rendition of verdict in said cause, the defendant The Waters-
ce Oil Company filed in court its motions for new trial and in
st of judgment, which motions are duly set forth in the record,
to which motions reference is here made as a part of this bill,
h motions for new trial and in arrest of judgment were filed
is court on, to wit, the 16th day of June, 1897.
nd thereafter, to wit, on the 25 day of June, A. D. 1897, said
ions for new trial and in arrest of judgment were argued by
sel and submitted to the court, and both were in all things
ruled by the court; to which ruling of the court the defendant
Waters-Pierce Oil Company, by counsel, then and there ex-
cepted and had their exceptions duly noted, and now here
during the term of said court the defendant The Waters-
Pierce Oil Company tenders this its formal bill of exceptions
id action and ruling of the court, and asks that the same may
gned and made a part of the record in this cause, which in
court is accordingly so done.

R. E. BROOKS,
District Judge, 26th Judicial District of Texas.

ndorsed:) 12589. The State of Texas *vs.* Waters-Pierce Oil Co.
of exceptions No. 3. Filed June 25, 1897. Jas. P. Hart, clerk.

Motion in Arrest of Judgment.

Filed June 16th, 1897.

In District Court, 26th Judicial District, State of Texas.

STATE OF TEXAS
vs.
WATERS PIERCE OIL COMPANY ET AL. } No. 12589.

the above entitled and numbered cause comes the defendant
Waters-Pierce Oil Company, after verdict, and here now files
its motion in arrest of judgment, and suggests to the court that
gment cannot be rendered upon the verdict in this cause ren-
d for the following reasons, to wit:

This defendant shows to the court that this suit is a proceeding based upon the terms and provisions of section 4 of an act entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them and to promote free competition in the State of Texas," approved March 30, 1889, which statute is a public law of the State of Texas, and section 4 of which is as follows:

"SECTION 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty
99 of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis county in the name of the State of Texas."

And also by virtue of an identical provision incorporated in a similar public act of the legislature of the State of Texas, with a similar title, approved April 30, 1895.

Now, this defendant says that by virtue of the terms and provisions of said section 4, hereinbefore recited, this court cannot enter judgment upon the verdict herein rendered, nor can this court, by judgment, prohibit this defendant, The Waters-Pierce Oil Company, from doing any business within this State in accordance with the prayer of plaintiff's petition herein, for that it appears from the allegations of said petition of plaintiff that this defendant is engaged not only in local trade within the State of Texas, but that it is also engaged in interstate commerce—that is to say, this defendant is a corporation duly incorporated under the laws of the State of Missouri, as shown by the record in this cause, and as such corporation it is chartered by said State of Missouri with powers under sanctions of law to sell petroleum and its products not only in the State of Missouri, but in other States of the American Union, and it is shown by the averments of plaintiff's petition, as well as by the evidence herein adduced, that this defendant is engaged in interstate commerce within the State of Texas, and this court is without jurisdiction to enter judgment prohibiting this defendant from transacting such business under its corporate powers within the State of Texas, nor can the State of Texas, by any act, either executive, legislative, or judicial, prohibit this defendant from doing such interstate business within the State of Texas.

And so this defendant says that section 4 of said acts of the legislature of the State of Texas approved, as aforesaid, on, to wit, March 30, 1889, and April 30, 1895, is violative of the Constitution
100 of the United States and is null, void, and of no effect, and no judgment can be entered upon the verdict in this cause herein rendered by the jury, for that this court is not authorized by law to enter such judgment upon said verdict partially forbidding this defendant from doing any particular character of business in this State, nor is this court authorized by the terms of plaintiff's petition herein filed and by the prayer of said petition to partially prohibit this defendant from doing any special character of business within this State, nor is it competent for this court, under the terms of said section 4, to make any such rule in the premises.

Wherefore this defendant comes now and files this its motion in arrest of judgment, and prays the court that judgment in this cause be arrested, and that the verdict herein be set aside and held for naught.

JOHN D. JOHNSON,
CLARK & BOLINGER,
Attorneys for Defendant Waters-Pierce Oil Co.

(Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Motion in arrest of judgment. Filed Jun- 16, 1897. Jas. P. Hart, clerk, by Fred. C. Davis, deputy.

Order on Motion in Arrest of Judgment.

June 25th, 1897.

STATE OF TEXAS
vs.
WATERS-PIERCE OIL COMPANY. } 12589.

And now, on this the 25th day of June, 1897, came the parties, by their respective attorneys; whereupon came on to be heard the motion of defendants in arrest of judgment and to set aside and
101 hold for naught the verdict rendered in this cause, and said motion being argued, submitted, and fully understood by the court, it is the opinion of the court that said motion ought to be overruled.

It is therefore ordered and adjudged by the court that the defendant's motion to arrest the judgment herein rendered against the defendant herein and set aside the verdict of the jury herein be, and the same is here now, overruled; to which ruling of the court the defendant, by counsel, excepts.

Motion for New Trial.

Filed June 16th, 1897.

In District Court, 26th Judicial District, State of Texas.

STATE OF TEXAS
vs.
WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

Now, in the above numbered and entitled cause, comes the defendant The Waters-Pierce Oil Company and here now moves the court that the verdict herein rendered by the jury be set aside, and that this defendant be granted a new trial, for the following reasons, to wit:

1. Because the court erred in overruling all the demurrers of this defendant, The Waters-Pierce Oil Company, herein filed, as shown by the judgment in this case.

2. The court erred in giving to the jury instructions contained in paragraph 11 of the charge to the effect that a corporation is

liable for the acts of its agents done in the scope of their employment and agency, because such charge was not applicable to the case upon trial nor to the facts of the case upon trial, in that said charge was pertinent only in a civil cause in a controversy between a corporation and a private person, firm, or corporation for
102 wrongful acts of its agents done within the scope of their employment, and not in a suit for forfeiture of the charter of a corporation, as in the case at bar.

3. The court further erred in paragraph 13 of the charge in instructing the jury, in substance, that the defendant corporation was bound by the acts of its agents if said agents were acting in the scope of their employment and agency in making certain contracts violative of the law of the State of Texas, for that in such case the agent only is liable for a transaction made by such agent in violation of the laws, and it is not to be presumed that such illegal contracts are authorized by the governing body of any corporation, and in the case at bar the evidence was wholly wanting as to any authority on the part of the defendant corporation authorizing any such illegal contracts, if any were made, but, to the contrary, the evidence was uncontradicted, and such illegal contracts, if entered into by any agent of the Waters-Pierce Oil Company, were unknown to the defendant company; and, further, because in law when an illegal contract is entered into by the agent of a corporation such corporation is not concluded by acquiescence therein, nor can such corporation ratify said illegal acts of its agents, and said charge of the court is to a contrary effect.

4. The court further erred in paragraph 16 of its charge by instructing the jury that certain evidence tending to show efforts and inducements offered by agents of the defendant company to parties to handle oils of the defendant company exclusively and tending to show refusal of agents of said company to sell to parties handling other oils than those of defendant company and the discrimination of prices against parties handling other oils than those of defendant company to break down competition were admitted in evidence not because such acts were unlawful or violative of the laws of the State of Texas, but were only admitted as bearing upon the question of the course of dealing of defendant company in this State and as bearing upon the question whether or not defendant company made or entered into the contracts or any of them, as set out
103 and mentioned in paragraph 10 of said charge, and as to whether or not such contracts or course of dealing was known to the governing officers of the defendant company or was authorized by them, and such proof did not tend to establish any such facts or conclusions, as stated by the court, but such evidence was illegal and inadmissible and should have been ignored by the court and should not have been commented by the court or the attention of the jury directed thereto in manner and form as set forth in said paragraph 16.

5. The court further erred in paragraph 20 of the charge by instructing the jury that the jury, in determining whether or not the agents of defendant company were authorized to make the contracts

alleged, if any were so made, or whether same were known to or acquiesced in by defendant company's governing officers, that it was not necessary for such authority to be shown by positive or direct testimony, but it might be shown by circumstances, and that the jury would take into consideration all the facts and circumstances in evidence before them in determining said question. Said charge gave an unbridled license to the jury to find a verdict upon mere presumption or suspicion and in the face of positive and direct testimony on the part of defendant company, uncontradicted, that if any illegal or unauthorized contracts were made by the agents of defendant company in the State of Texas, such contracts were not known to the company. By the terms of this charge the jury were authorized to disregard this positive testimony and to found their verdict upon mere suspicion.

6. The court further erred in paragraph 10 of its charge in instructing the jury in effect that if the defendant company entered into or formed a contract in this State with any parties dealing in oils since July 6, 1889, by the terms of which contract it was agreed that said parties were to buy oils from the defendant company exclusively for any specified time and from no other source in
104 consideration of rebates allowed them by defendant company, because, as shown by the evidence in this case, there was no such contract entered into between defendant company and any citizen or dealer in Texas, for that such contract or pretended contract was not, in fact, a contract, in that it lacked the essential characteristic of mutuality, for that there is no evidence in the record tending to show that the defendant company, The Waters-Pierce Oil Company, ever agreed with any party in Texas to sell oils exclusively to such party and to no other person, but, on the contrary, each of said pretended contracts manifest that the Waters-Pierce Oil Company was at liberty at all times to sell its oils to whomsoever it pleased, regardless of any such pretended contract, and such charge of the court was without evidence in the record to support it.

7. The court further erred in said paragraph 10 of its charge in instructing the jury to find against the defendant company if said company, acting through its duly appointed and authorized agents, since July 6, 1889, made, entered into, and carried out a contract in this State with any of the persons named in plaintiff's petition, by the terms of which said parties bound and obligated themselves, for a valuable consideration, to buy all their oils from the defendant company and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, for that such contract or contracts if entered into do not show a combination in restraint of trade and a violation of the laws of this State, for that such pretended contract lacked the essential characteristic of mutuality and was not binding in any manner upon the defendant company, nor does the charge of the court make it necessary that such pretended contract should bind the defendant company; but, under the law as given and in the ab-

sence of such mutuality and combination, the effect of the
105 charge of the court was to hold this defendant company liable for a contract in restraint of trade, and such contract did not bind this defendant company in any manner whatsoever, nor did such contract show any combination whatsoever between this defendant and any other person in restraint of trade. Said charge is further erroneous in so far as it instructs the jury that such contract was illegal if it embraced a provision that parties purchasing from defendant company should not sell oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, in that such transaction is not violative of the laws of the State of Texas.

8. The court further erred in refusing charges numbers one, two, three, four, five, and six, requested by defendant company, as shown by the record in this case.

9. The court erred in admitting, over the objection of the defendant The Waters-Pierce Oil Company, the answers of State's witness C. J. Rosenberg, of La Grange, Texas, to interrogatories numbers fifteen and sixteen of plaintiff, which answers are as follows: "15. When I sold oil in Ellinger, in 1886, or about 1886, I received a wholesaler's rebate of ten cents per case or one cent per gallon. I received one and one-half cents per gallon here prior to 1895, and am now again receiving the wholesaler's rebate of one and one-half cents per gallon for all oils sold for them. 16. These rebates are given as a wholesaler's rebate with the provision to buy exclusively from the Waters-Pierce Oil Company and was verbal; could be terminated at any time." Said answers were objected to, first, because the testimony of the witness as to transactions in 1886 with the Waters-Pierce Oil Company were incompetent and irrelevant, as was also the witness' testimony of rebates received by them from defendant company prior to 1895 without specifying the date of such rebates, and such testimony as to rebates was further incompetent, irrelevant, and should not have been admitted, and was objected to by the defendant company upon that ground because it was no violation of the law for the defendant company to
106 give dealers, and especially dealers who were selling oils for it, the defendant company, such rebate or discount as it might see fit for the purpose of encouraging and building up its trade.

10. The court further erred in admitting, over the objections of defendant, the answers of the witness M. Lillianstein to interrogatories fifteen and sixteen of said witness' deposition, which interrogatories asked with reference to whether he had ever received any rebates from The Waters-Pierce Oil Company, defendant, and the consideration for such rebates, which questions were objected to by the defendant company, because if rebates were given by the defendant company to witness, such rebates were not in violation of the laws of the State of Texas, and such evidence was incompetent and immaterial; which objection was overruled by the court and the answers thereto admitted in evidence, which answers were to the effect that witness' firm had received rebates of one cent per gallon from defendant company since July 31, 1889, but that there was no

consideration therefor, witness not being required to do anything or abstain from doing anything in order to earn the rebate.

11. The court further erred in admitting, over the objection of defendant company, the answer of the witness M. Lillianstein to plaintiff's twenty-third interrogatory-in-chief, which was to the effect and by way of inquiry if defendant company at any time had ever refused to sell witness oil as cheap as it sold to others at the same time, or, in other words, had defendant company ever discriminated against witness in prices; to which question the defendant company objected, because there was no law of the State of Texas prohibiting defendant company from discriminating or from selling to different persons at different prices, and such acts constituted no violation of the trust acts of the State of Texas; which objection was overruled by the court and said testimony admitted to the effect defendant company had discriminated against the witness in 1895 in Mount Pleasant.

107 12. The court further erred in admitting, over the objections of the defendant company, testimony of numerous witnesses as to discrimination by defendant company in prices, as to refusal of defendant company to sell to said witnesses at the same prices as sales were made to others, and so forth and so forth, as shown by exceptions duly reserved at the time and incorporated into the statement of facts herein filed.

13. The court further erred in refusing to admit in evidence that portion of the answer of the witness H. C. Pierce to cross-interrogatory number twenty propounded to said witness by defendant company, the portion rejected being "or any officer of the Waters-Pierce Oil Company," because such evidence was competent, legal, and pertinent, in that the said H. C. Pierce could testify as to authority given by himself or by any other officer of the Waters-Pierce Oil Company as therein mentioned.

14. The court also erred in admitting, over the objection and exception of defendant company, other testimony offered on behalf of the State and excluding, over the exceptions of the defendant company, testimony offered on its behalf; all of which more fully appears in the statement of facts herein filed.

15. The court further erred in striking out from the circular of defendant The Waters-Pierce Oil Company, signed A. M. Finlay, vice-president, the same being a printed circular and the portions stricken out upon objections of the State being the following: "Such arrangements, if made, were effected without the authority or knowledge of the company and contrary to its policy and previous instructions on the point." The defendant company was entitled to have the whole of said circular go to the jury, and the elimination by the court of said paragraph of said circular upon objection of the State was highly prejudicial to the defendant.

16. The verdict of the jury is contrary to the law and the evidence in this case for the following reasons, to wit:

108 (*a.*) Said verdict is contrary to the law, because the statutes upon which this prosecution or proceeding is based are violative of the Constitution of the United States and of the State of

Texas and are null and void and will not support any verdict in any proceeding, and especially the verdict herein rendered.

(*b*) Said verdict is further contrary to the law for that, under and by virtue of the terms and provisions of section 4 of the act of 1889 and a similar section of the act of 1895 and upon the facts as disclosed by the evidence in this case, to wit, the Waters-Pierce Oil Company was a foreign corporation and engaged *inter alios* in interstate commerce within this State, and upon the record so made it is not competent or permissible for the State of Texas, by any proceeding, executive, legislative, or judicial, to prohibit or attempt to prohibit the defendant company from doing any business within this State, which the verdict herein rendered proposes to do, and hence said verdict is contrary to law.

(*c*.) The verdict in this case is contrary to the evidence for that, conceding in a few instances certain agents or employés of the Waters-Pierce Oil Company, as shown by the evidence, have violated laws of this State in entering into contracts with certain citizens of this State, which contracts were prohibited by law, yet it devel*o*ped upon the State to establish by affirmative testimony not only that such agents acted within the scope and purview of their authority, but that they were authorized to make said contracts by this defendant company, which evidence is wholly wanting on the part of the State; but, to the contrary, it was established by this defendant by uncontradicted testimony that such acts and transactions, if any such were made, by the agents of this defendant company *they* were made and done without the knowledge of the governing authority of the defendant company; and so this defendant company says that said verdict is contrary to the evidence and should be set aside, and that said acts and transactions of said agents
109 did not constitute a violation of the laws of Texas. This defendant further says that the verdict is further contrary to the evidence for this, that the uncontroverted testimony in this case shows that if any contract was entered into between any agent or pretended agent of this company and certain citizens of Brownsville, such contract related exclusively to interstate commerce within the meaning of the Constitution and laws of the United States, in that, according to the testimony of the State, as well as the testimony of this defendant company, all oils shipped by this defendant company to Brownsville were shipped from another State of the United States, to wit, the State of New York, to said city of Brownsville direct, and were there sold in unbroken packages, and hence this defendant says that said transactions at Brownsville are beyond the cognizance and jurisdiction of this court in this cause, but the same were not eliminated from the consideration of the jury, and the verdict may have been founded by the jury in whole or in part upon said interstate transaction.

Wherefore comes this defendant, The Waters-Pierce Oil Company, and prays the court for the reasons above set forth that the verdict

rendered by the jury in this cause be set aside, and that this defendant be granted a new trial.

JNO. D. JOHNSON,
CLARK & BOLINGER,
Attorneys for Defendant Waters-Pierce Oil Company.

(Endorsed:) State of Texas *vs.* Waters-Pierce Oil Co. Motion for new trial. Filed Jun- 16, 1897. Jas. P. Hart, clerk, by Fred C. Davis, deputy.

Order on Motion for New Trial.

June 25th, 1897.

110 STATE OF TEXAS *vs.* WATERS-PIERCE OIL COMPANY. } 12589.

And now, on this the 25th day of June, 1897, came the parties plaintiff and defendant, by their respective counsel, and thereupon came on to be heard the defendant's motion for a new trial of this cause, and said motion being heard, argued, and submitted and fully considered, the court is of the opinion that the same should be overruled, and—

It is ordered and adjudged by the court that the motion of the defendants for a new trial of this cause be, and the same is, overruled, and a new trial of this cause be, and the same is hereby, refused.

To which ruling and action of the court in overruling the motion for arrest of judgment, as well as overruling the motion for a new trial of this cause, the defendant, by counsel, in open court excepts, and in open court gives notice of appeal to the court of civil appeals for the third supreme judicial district of the State of Texas.

It is further ordered by the court that the parties do have and are allowed ten days from and after adjournment of the present term of this court in which to prepare and file a statement of facts in this cause.

Statement of Facts.

Filed June 26th, 1897.

In District Court, 26th Judicial District.

THE STATE OF TEXAS *vs.* WATERS-PIERCE OIL CO. ET AL. } No. 12589.

111 Be it remembered that upon the trial of the above numbered and entitled cause in the district court of the 26th judicial district of the State of Texas, at Austin, which trial was begun and holden on, to wit, the 5th day of June, 1897, and was concluded on the 15th day of June, A. D. 1897, the following evidence was adduced by the respective parties, plaintiff and defendants:

Plaintiff's Evidence.

The plaintiff introduced in evidence and read to the jury the following agreement of counsel:

In the District Court of Travis County, Texas, 53rd Judicial District.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL CO. ET AL.

It is agreed by and between the parties hereto as follows:

1. The allegations made in paragraphs 1, 2, 3, & 4 of plaintiff's first amended original petition are admitted to be true.

2. The facts alleged in paragraph 5 are admitted, but the allegations or conclusion that such facts constituted an unlawful combination or trust is denied.

3. The facts and allegations, including the agreement, set out and stated in paragraph 6 of said amended petition are admitted, except that it is not admitted that said facts or agreements constituted an unlawful combination, trust, or agreement.

4. It is agreed that the printed copy of an agreement of the Standard Oil trust and the proceedings of the certificate-holders entered into in the city of New York on the 21st day of March, 1892, providing for the dissolution of the trust and the winding up of its affairs, shall be admitted in evidence, it being the same agreement, and the proceedings agreed to be admitted in the case of the State of Texas *vs.* E. T. Hathaway *et al.*, tried in the district court of McLennan county, Texas.

5. The facts and allegations made in paragraph 8 of plaintiff's said amended petition are admitted.

112 6. In relation to paragraph 9, it is admitted that the Waters-Pierce Oil Company sells illuminating oils in southern Missouri, Arkansas, Louisiana west of the Mississippi river, Texas, Indian Territory, and in Old Mexico without competition therein on the part of any of the persons, companies, and corporations mentioned in paragraph 6 of the bill, and that said Waters-Pierce Oil Company does not sell said oils elsewhere.

7. It is also agreed that either may read any part of the testimony of the parties mentioned in paragraphs 11, 12, and 13 as taken down in the Hathaway trial, had in the district court of McLennan county on the — day of ——, 1895.

8. In connection with paragraph 22, *of* the testimony of the witness Clem may be read, together with copy of the agreement made by the Eagle Refining Company and the Waters Pierce Oil Company, marked "Exhibit A" and made a part hereof, which said copy of agreement will be admitted in evidence without further proof of its execution.

9. In connection with paragraph 23, it is agreed that the testi-

mony of C. W. Robinson, taken at the Hathaway trial, may be read in evidence.

11. It is further agreed that the testimony of the following witnesses as taken from the stenographer's report in the Hathaway trial, above mentioned, may be read in evidence, subject, however, to objections for irrelevancy and exceptions to the trial court's rulings thereon:

B. P. Stephenson, of Dewitt county.
D. F. Hair, of Bell county.
Charles Howard, of McLennan county.
E. F. Ehlinger, of Goliad county.
E. A. Arnim, of Fayette county.
H. Becker, of Washington county.
W. A. Bryan, of McLennan county.
J. W. Thompson, of McLennan county.
Hermann Voss, of Coryell county.
113 W. M. Foster, of Brazos county.
T. A. Fuller, of Bowie county.
W. F. Hanning, of Caldwell county.
H. Schmidt, of Robertson county.
C. W. Robinson, of Harris county.
A. W. Clem, of Dallas county.

M. M. CRANE,
Att'y Gen'l, Att'y for State of Texas.
C. P. & J. D. JOHNSON,
CLARK & BOLINGER,
Att'ys for Defendants.

The State next offered in evidence an agreement made and entered into between the Eagle Refining Company and the Waters-Pierce Oil Company, dated October 6th, 1894, and accompanying papers, which are as follows, to wit:

This agreement, made and entered into at the city of Cleveland, State of Ohio, this 5th day of October, 1894, by and between the Eagle Refining Company, a corporation organized under the laws of the State of Ohio, party of the first part, S. S. Drake of the city of Bedford, State of Ohio, A. G. Carpenter, W. A. Smith and W. H. K. Rose, of the city of Cleveland, State of Ohio, and A. W. Clem, of the city of Dallas, State of Texas, parties of the second part, and the Waters-Pierce Oil Company, a corporation organized under the laws of the State of Missouri, party of the third part, witnesseth: That in consideration of the original agreement between the said Eagle Refining Company and the said Waters-Pierce Oil Company, which is hereto attached and made a part hereof, and the payment of the Eagle Refining Company of the sums of money required by the said agreement to be paid to it by the said Waters-Pierce Oil Company, to wit: the sum of ten thousand four hundred and ninety-four dollars and nineteen cents, receipt of all which is hereby
114 acknowledged by it; the said Eagle Refining Company has sold, assigned, transferred, set over and delivered, and by these presents, does sell, assign, transfer, set over and deliver, unto

the said Waters-Pierce Oil Company, all its plant, stock, storage tanks and merchandise, heretofore owned and used in the business carried on by it in the State of Texas, enumerated in said original agreement and the inventory hereto attached and made a part hereof, together with the good will of said business in said State.

And for the said consideration, the said Eagle Refining Company gives and grants to the said Waters-Pierce Oil Company the exclusive right and authority to use in, and in connection with, the business carried on by the said Waters-Pierce Oil Company, in the State of Texas, Missouri, Arkansas, Louisiana west of the Mississippi river, the Indian and Oklahoma Territories and the Republic of Mexico, its said name of Eagle Refining Company, and all its brands, labels and trade-marks, heretofore used by the said Eagle Refining Company in said States, Territories and Republic, or either of them.

And for the said consideration and other valuable consideration moving to them and each of them, the said Eagle Refining Company and the said S. S. Drake, A. G. Carpenter, W. A. Smith, W. H. K. Rose and A. W. Clem, who are respectively the president, vice-president, secretary, treasurer, general manager and agent of the said Eagle Refining Company, covenant and agree to and with the said Waters-Pierce Oil Company, that neither the said Eagle Refining Company nor the said parties of the second part, shall or will for a term of fifteen years from and after the date of these presents, directly or indirectly, manufacture, refine, buy, sell or deal in, petroleum or other oils or their products, or any goods, wares or merchandise, manufactured, handled or dealt in, by the said Waters-Pierce Oil Company, in the said States of Missouri, Arkansas, Louisiana west of the Mississippi river, Texas, and the Indian and Oklahoma Territories and the Republic of Mexico.

115 In witness whereof, the said Eagle Refining Company has caused these presents to be executed by its president and its corporate seal to be affixed, and the said parties of the second part have hereunto set their hands,—all done at the said city of Cleveland the day and year first above written.

(Signed) THE EAGLE REFINING CO.
S. S. DRAKE, *Pres't.*
S. S. DRAKE.
A. G. CARPENTER.
W. A. SMITH.
(Signed) WM. H. K. ROSE.
A. W. CLEM.

For value received, the undersigned, A. W. Clem, has released, assigned, transferred, and set over, and by these presents does release, transfer, and set over, to the said Waters-Pierce Oil Company whatever interest he has, holds, or owns in and to the property, business, good will, labels, trade-marks, etc., mentioned in the foregoing instrument.

In witness whereof I have hereunto set my hand at the city of Cleveland, State of Ohio, the 5th day of October, 1894.

A. W. CLEM.

(*Memorandum of Agreement.*)

Waters-Pierce Oil Company.

ST. LOUIS, MO., *September 13th*, 1894.

Mr. W. H. K. Rose, general manager Eagle Refining Co., Cleveland, Ohio.

DEAR SIR: In accordance with our verbal understanding of yesterday, we are to purchase the Eagle Refining Company of Cleveland, Ohio's, plant, stock, business, etc., situated in the State of Texas, and are to pay for same their present value, which
116 shall be actual cost where located, according to your inventory to be furnished us. It is understood that if the plant referred to cost, according to your books, more than $5,600.00, we are not to pay you more than that amount for it; also that if any part of the plant enumerated in your inventory and as shown by your books is missing, its cost value is to be deducted from the $5,600.00.

In addition to the $5,600.00 or less above provided to be paid you, we are to purchase from you at your actual cost two storage tanks now at Ft. Worth, Texas; also one lot of ground at Oak Cliff, Tex. We are also to receive from and pay to you your actual cost for your merchandise on hand everywhere located in the State of Texas.

All cash, notes, book accounts, or other assets belonging to your Texas business *is* to remain your property, and Mr. A. W. Clem may, while in your employ, collect and handle such assets for your account as you may direct without cost to you so far as his services are concerned.

A transfer of this property is to be made to us by you on or before October 1st, 1894, and a legal contract executed by each of us providing for the Eagle Refining Company of Cleveland, Ohio, and the individuals now connected therewith refraining from transacting any business in petroleum or other oils and goods handled by this company in the States of Missouri, Arkansas, Louisiana west of the Mississippi river, and Texas, the Indian and Oklahoma Territories and Republic of Mexico during a term of fifteen years from October 1st, 1894; also that the Waters-Pierce Oil Company are to have the privilege of continuing and enlarging the present business of the Eagle Refining Company of Cleveland, Ohio, in that name; also the use of its trade-marks, brands, etc., within the States of Missouri, Arkansas, Louisiana west of the Mississippi river, and Texas, the Indian and Oklahoma Territories and the Republic of Mexico.

It is further understood that so much of the $2,500.00
117 which we are to pay under our agreement of this date with A. W. Clem shall be paid by us to you as may be necessary to make good to you Mr. Clem's acknowledged indebtedness to you.

Yours truly,

(Signed) H. C. PIERCE, *President.*

We hereby accept the above agreement.
(Signed) WM. H. K. ROSE.

Subject to approval of the company.

CLEVELAND, O., *Oct. 1st*, 1894.

This is to certify that at a special meeting of the directors of the Eagle Refining Co., held in the city of Cleveland, Ohio, on the first day of October, 1894, the following resolutions were passed:

Resolved, That we hereby accept the proposition of the Waters-Pierce Oil Co. of St. Louis, Mo., for the purchase of our branch in Dallas, Texas, and other towns named in said proposition, including also such other territory as named therein, and we hereby authorize our general manager, W. H. K. Rose, to accept said proposition in behalf of this company, with authority to execute all the necessary papers for transferring and completing the same, and for the purpose of conveying the real estate at Dallas, Texas, the vice-president of this company, A. G. Carpenter, Esq., and the secretary, W. A. Smith, are hereby authorized and empowered to execute a deed conveying said premises in fee-simple.

In witness whereof I hereunto set my hand as the secretary of said company and attach the corporate seal hereto this 1st day of October, 1894.

[Seal of Eagle Refining Co.]

(Signed) W. A. SMITH, *Sec't'y.*

This memorandum of agreement made and entered into at the city of St. Louis, State of Missouri, this 5th day of October,
118 1894, by and between the Waters-Pierce Oil Company, a corporation organized under the laws of said State, the first party, and A. W. Clem of the city of Dallas, State of Texas, the second party, witnesseth:

That the first party has employed, and by these presents does employ the second party as a manager, assistant manager, agent or salesman, of or in a branch or department of its business in Texas, or elsewhere, or in such other like capacity as the first party, or its duly authorized officers or agents, may from time to time determine, for a term of three years, beginning on the first day of October, 1894, and ending on the first day of October, 1897, and promises and agrees to pay the second party, for the faithful performance of the duties and services of said employment, as prescribed herein, the sum of two hundred and fifty dollars ($250.00) per month, payable at the end of each month.

That the said A. W. Clem has accepted and by these presents does accept, said employment, and promises and agrees to faithfully perform the duties and services thereof, as they may from time to time be prescribed and directed by the authorized officers and agents, and the rules and regulations of the first party.

In witness whereof, the first party has caused these presents to be executed by H. C. Pierce, its president, and the second party has

hereunto set his hand, in duplicate, the day and year first above written.

(Signed) WATERS-PIERCE OIL CO.,
By H. C. PIERCE, *Pt.*
A. W. CLEM.

H. A. DENNETT then testified for the State by deposition as follows:

My name is H. A. Dennett. I reside at San Antonio, Texas, and by occupation am stock clerk of the Waters-Pierce Oil Company. I am not a dealer in oils. The Waters-Pierce oil is now being
119 sold in my town and has been sold for over ten years. I do know of other oil having been sold in San Antonio since July 31st, 1889, and when such oil was brought in, reduction was made to compete with competing prices. I do not remember what the prices were before the arrival of competing oil, and I am unable to state the reduction made and how long said reduction continued. Competitive oil has been continually sold in San Antonio since my arrival there, August 1st, 1895, and is still being sold. The Waters-Pierce Oil Company has storage tanks there which have been there since my earliest recollection, the storage capacity in San Antonio for that company being something over forty thousand gallons. These storage tanks are filled from railroad tank cars and the trade being supplied by tank wagons and iron barrels. The company also has an oil warehouse to store cases and barrel oil which is supplied to the trade by wagon and shipped local on railways. I am acquainted with the methods of the Waters-Pierce Oil Company of preparing shipments, the majority of the oil being cased and barrelled in Texas. Parties selling oil in Texas in competition with the Waters-Pierce Oil Company are the Texas Oil and Gasolene Company and George Rice, of Marietta, Ohio. These oils are regularly sold in competition with the Waters-Pierce Oil Company in San Antonio. Competing oils are regularly sold at Taylor, Texas, and Hutto, by George Rice. The Waters-Pierce Oil Company also has competition at Laredo, but I am unable to state whose oil or what merchants are handling it. The Waters-Pierce Oil Company own tanks and warehouses within my knowledge in the following towns in Texas for storage of oils, to wit: San Antonio, Laredo, Corpus Christi, Beeville, New Braunfels, San Marcos, Austin, Georgetown, Taylor, Burnet, Llano, and all other towns in the State of much importance. I am not a dealer in oil and have never received ant rebates or blandishments from the Waters-Pierce Oil Company, as I first began my career with them. I have handled
120 other oils in competition with the Waters-Pierce Oil Company. I sold oil for two weeks for George Rice, and the result was very satisfactory. While selling oil for George Rice the methods and conveniences of the Waters-Pierce Oil Company in delivering and handling oils seemed to offset with the merchants the reduction generally made by Rice of one or two cents per gallon below Waters-Pierce Oil Company's prices. Mr. Lewis Fries is manager of the Western division for the Waters-Pierce Oil Company

at San Antonio and is engaged in no other business. There is an agent in San Antonio, Mr. Fries, who is permanently located there. There is an agent in town.

The following portions of the depositions were read by defendants:

There are no requests or requirements made to the merchants to retail oil at any fixed prices; merchants make their own prices. (The State objected to the admissibility of this evidence because it was hearsay; which objection was overruled, and the State, by counsel, accepted.) I am not a dealer in oil. I do not know of any one who has entered into any agreement with the Waters-Pierce Oil Company to handle their oils exclusively or to sell at any fixed prices to the consumers. I have received no instructions from the company not to sell all merchants or persons, provided their financial standing was not good and they were not in a combination against us. The oil shipped to the company, so far as I know, is from St. Louis, being shipped by the Waters-Pierce Oil Company to themselves at destination. Our orders for oil are sent to the Company at St. Louis, and the oil shipped to us is always shipped in car-loads, mostly in tank cars; sometimes in barrels and cases. Competitive oil is being continually offered and sold in San Antonio. As a general rule, competitors sell as near to the Waters-Pierce Oil Company prices as possible, and should such competitors sell at a reduction from Waters-Pierce Oil Company prices, the Waters-Pierce Oil Company is besieged by the merchants who do not buy
121 any of the competitive oil for prices that will enable them to make a margin and still compete with the competitive shipment. I have never received any instructions not to sell certain persons provided their financial standing was good and they were not in any combination against us.

C. J. ROSENBERG testified for the State by deposition as follows:

My name is C. J. Rosenberg, and I reside at La Grange, Fayette county, Texas; have dealt in illuminating oil for fifteen years, with one and one-half years' intermission, and am now dealing in illuminating oils. I buy my supply of oil at present from the Waters-Pierce Oil Company. The Waters-Pierce oil is being sold in my town and was sold here when I came here, six years ago. I know of competitive oil having been brought to my town and sold or offered for sale in competition with the Waters-Pierce Oil Company since July 31st, 1889. George Rice sold oil here in 1891 and in 1895. James Butts and C. W. Robinson, of Houston, sold some oil here. In 1891 I bought one car of oil from George Rice, whereupon the local agent of the Waters-Pierce Oil Company asked me to sell the car to him. I refused. Later oil prices were cut five cents lower on Brilliant oil that I paid for mine and very near to my cost on a better grade. This lasted until I told the travelling agent of the Waters-Pierce Oil Company that I would patronize his house. This same occurred again in 1895.

(The defendant objected to the introduction of this testimony of

the witness as to cutting prices, because the same was incompetent and irrelevant and did not tend to prove any issue in the cause, in that it was no offense under the laws of the State of Texas for any dealer to cut prices; which objection was overruled by the court; to which the defendant excepted.)

I have received wholesalers' rebates from the Waters-Pierce Oil Company, which were given me in consideration that I bought exclusively from the Waters-Pierce Oil Company. The arrange-
122 ment was verbal and could be terminated at any time.

(The defendant objected to the introduction of this portion of the witness' testimony as to rebates, because the same was irrelevant and incompetent and did not prove any issue in this cause, in that the giving of rebates was no offense under the law and did not show any violation of the anti-trust act of the State of Texas; which objection was overruled by the court, and the evidence was admitted; to which the defendant excepted at the time.)

The defendants read in evidence the following portion of the deposition of said C. J. ROSENBERG:

It is a fact that oil — frequently brought to my town and sold or offered for sale in competition with the Waters-Pierce Oil Company since July 31st, 1889. It is also a fact that each time this competitive oil was brought into my town it was offered at a price below that being charged by the Waters-Pierce Oil Company, and there was always a cut in prices by those dealing in competitive oils. The Waters-Pierce Oil Company always met these cuts in prices by reducing their own prices, and they invariably went below the other parties. I know nothing about the price of oil except what I could buy it at home. A buyer of large quantities always receives lower prices than a buyer of small quantities in all lines, some jobbers refusing even to fill small orders. I have been frequently approached by dealers in other lines and offered inducements in the way of rebates or blandishments to handle exclusively their particular products. This is an every-day custom in trade, and has been customary for many years for dealers to promote their business and trade by offering special inducements in particular cases.

W. C. BARKER testified for the State by deposition as follows:

My name is W. C. Barker, and I reside in Llano, Texas. My occupation is that of a merchant in general merchandise. I
123 have dealt in oil and am now dealing in oil, selling the same.

I have purchased from the Waters-Pierce Oil Company, but the last purchase I made was from the Ohio Oil Company. Waters-Pierce oil is sold here now, and has been sold here at Llano for the last four or five years. The company has an agent at this place. Since the year 1889 I bought a car-load of oil from a different company than the Waters-Pierce Oil Company. I bought it this year (1896), about February 1st. There was a change made as soon as they found out my oil was in town. They sent circulars all over town making a decline in their prices. Up to that time the Waters-Pierce Oil Company sold Upion oil at 25½ cents per gallon and Bril-

liant at 21½ cents per gallon, and since that time the Waters-Pierce Oil Company have sold the Upion oil at 17 cents per gallon, and the Brilliant they sold at 13 cents, at which prices they have been selling ever since. I received my oil, which is still in part yet on hand. I know of no other competitive except the oil I bought, and which I have — a great measure still on hand. The Waters-Pierce Oil Company has a storage tank at that place, which they put up after the arrival of my oil. I suppose it has been up about four or five months. The capacity in gallons I do not know, though it holds two car-loads. I cannot testify as to how the Waters-Pierce Oil Company put up their oil, as I have never seen them filling or supplying the trade, and therefore do not know their process for doing same. They did have a warehouse here, in which they stored oil in packages up to the time they put up the tank, since which time they shipped the empty cans in and fill from the tank. I have seen the empties come. The empty cans are brought to Llano and filled at Llano. Barrels are also shipped in and sent out from here through their local agent. The Waters-Pierce Oil Company is the only oil company that has a tank or warehouse in this community. There is no oil being regularly sold in competition with the Waters-Pierce Oil Company except that portion of a car-load which I now have on hand, bought last February. Of course, I mean to say in this
124 town. I know nothing about oil sold except that sold in the town of Llano, Texas. I have seen oil tanks in most of the towns of importance in Texas, but could not say positively of my own knowledge whether they were owned by the Waters-Pierce Oil Company or not. I only know that they have them — Llano, Burnet, and Lampasas. The Waters-Pierce Oil Company has never refused to sell me oil, though I have never tried to buy any from them since I purchased the oil before spoken of.

M. LILLIENSTEIN testified for the State by deposition as follows, said deposition being taken October 1st, 1896:

My name is M. Lillienstein. My residence is Mt. Pleasant, Texas. I am a merchant at that place. I am now dealing in oil. I purchase at present from the Waters-Pierce Oil Company. The Waters-Pierce Oil Company's oil has been sold in my town for a number of years. I know of oil having been brought to my town and sold or offered for sale in competition with the Waters-Pierce Oil Company since July 31st, 1889. The Waters-Pierce Oil Company have a tank here at Mt. Pleasant. It has been here about three or four months. I do not know its capacity. I do not know anything about the filling or drawing of oil nor how they handle their oil. They have a house in which they store oil in packages, I think. The packages are tanks that hold about 50 gallons, and cans that hold about 5 gallons each. They are supplied to their customers, the dealers, in packages only. No other company or dealer in oil have tanks or warehouses in my town, and no oil is sold here in competition with the Waters-Pierce Oil Company. I do not know of any oil being regularly sold in any place or town in Texas in competition with the Waters-Pierce Oil Company. I have handled other oils in competition with the

Waters-Pierce Oil Company one time, but I sold no oil during the fight on the price of oil. I had no further offer or inducement to handle the Waters-Pierce oils than a rebate of 1 cent per gallon.

125 If any agent of the Waters-Pierce Oil Company approached me for the purpose of trying to get me to quit handling competitive oils, I don't remember the exact conversation. I have not received any letters from the Waters-Pierce Oil Company or its agents seeking to get me to quit handling competitive oils, or offering in any way to interfere in my business. The Waters-Pierce Oil Company nor any of its agents ever refused to sell me oil. In 1895 the Waters-Pierce Oil Company, through its agent, refused to sell me oil as cheap as it sold to others at the same time. (The defendants objected to this portion of the testimony of the witness because the same was irrelevant and immaterial, discrimination being no offense under the trust laws of Texas, or any act of discrimination being violative of such trust laws. The court overruled the objection; to which the defendants excepted.) The Waters-Pierce Oil Company have an agent at Mt. Pleasant; his name is C. D. Dickson; he is a clerk for F. W. Fitzgerald & Co. When the competitive oil came into Mt. Pleasant we got that oil cheaper than the Waters-Pierce Oil Company was selling oil; the Waters-Pierce Oil Company reduced the price of their oil, but not to the parties who were handling the competitive oil, and this competition evidently reduced the price of oil in that market.

(The defendants objected to this testimony of the witness because the same was irrelevant and immaterial, as it did not show any contract to bring the transaction within the statute; that the Waters-Pierce Oil Company had a right to reduce their prices to any merchants they saw fit and to discriminate against others, and such transaction was not violative of the trust acts of Texas, as the Waters-Pierce Oil Company was not compelled to sell oil to anybody that it didn't want to sell oil to. The court overruled the objection; to which ruling of the court the defendants then and there excepted.)

H. W. CHENEY testified for the State as follows by deposi-
126 tion, said deposition having been taken on the 28th day of September, 1896:

My name is H. W. Cheney, and I reside at Mt. Pleasant, Texas; my occupation is a furniture merchant. I have dealt in oils, but am not now dealing in oils; the Waters-Pierce Oil Company has sold oils here at Mt. Pleasant for the last five years, to my knowledge. I have handled other oils in competition with the Waters-Pierce Oil Company here at Mt. Pleasant; the Waters-Pierce Oil Company interfered with my sales of this competitive oil by their refusal to sell me oil at prices given or made to others; this was in 1895, I think, that one of the agents of the Waters-Pierce Oil Company refused to sell me the Upton oil because I was handling competitive oils of the same grade; it was in the town of Mt. Pleasant, Texas; the Waters-Pierce Oil Company have upon two occasions

refused to sell me oil as cheap as it sold to other merchants in the same town; it was in the month of April or May, 1895, in the town of Mt. Pleasant, Texas; the agent said his reasons for discriminating was that I had been handling competitive oils. (The defendants objected to this testimony because the same was irrelevant and immaterial and showed no violation of the trust laws of the State of Texas, nor did it tend to prove any issue in the case; the defendants also objected on the ground that it did not appear who the agent was nor where the conversation was, but simply stated a conclusion of the witness, and that agency could only be established by showing specially who the agent was, and not the conclusion of the witness. The court overruled these objections, and the defendants excepted.) The Waters-Pierce Oil Company have an agent at Mt. Pleasant; his name is C. D. Dickson; he is also engaged as a clerk in the grocery house of F. W. Fitzgerald & Co. When competitive oils came into the Mt. Pleasant market, as before testified, it was offered me at one time at a price less than offered by the Waters-Pierce Oil Company; the Waters-Pierce Oil Company met these cuts in prices to
127 those who were not handling competitive oils, but flatly refused to make any reductions at all to those who were handling competitive oils. (The defendants objected to this testimony for the reasons that such testimony was irrelevant and immaterial and did not tend to prove any issue in this cause, in that the act testified about did not constitute a violation of the law; but the court overruled the objection, and the defendants excepted.) I have testified as above from my own personal knowledge.

W. C. DUGGER testified in person for the State as follows:

I reside at San Marcos, Texas, and have lived there about 21 years. I have been engaged in the oil business first for the Waters-Pierce Oil Company and then for others, and later on my own account. Until about a year ago the Waters-Pierce Oil Company had only one tank at San Marcos—about a 12,000-gallon tank—and they had Brilliant and Upion oil, and shipped case oil from Austin, but since that time they have put up three tanks and brought in a tank wagon. The first tank has a capacity of about 12,000 gallons. I know that, because I handled it for years. The last two tanks, I think, about 6,000. These tanks are built upon rock pillars about three feet from the ground, and the oil is pumped into them from the tank cars on the railroad track. The Waters-Pierce Oil Company would sell a merchant in San Marcos oil from these tanks. Until the Waters-Pierce Oil Company got their tank wagon orders from the merchants were filled from the warehouse. It was drawn out in iron barrels and carried to their stores, but now in the last six or eight months they have a tank wagon that holds two different kinds of oil, one hundred gallons each—maybe two hundred—and this wagon goes there and the oil is drawn out of the tanks and is carried to the back door of the merchants and pumped into their five-gallon cans or into their tanks in the merchants' stores. Before they had this wagon they delivered oil in iron barrels. The Bril-

liant oil was shipped there in tank cars and put into these
128 storage tanks and then drawn out in the iron barrels, and the Eupion was drawn out here in Austin. The oil was not delivered there in original packages. I know about the methods of the Waters-Pierce Oil Company in doing business at Austin. Their methods are similar here. I have been all through their tanks and warehouses. I couldn't say whether they run a tank wagon here or not. I know that the oil is shipped here in tank cars and put into storage tanks. They only use these tank wagons in cases of competition. I also know the methods of their doing business at San Antonio. It is similar there. They run a tank wagon there. I know Arthur M. Finlay personally and his brother. My recollection is that my connection with the Waters-Pierce Oil Company commenced in 1890 and terminated in 1893. I was working for them at San Marcos. My father-in-law was in business there. His name was S. L. Pegues. The Waters-Pierce Oil Company wanted an agent there at San Marcos, and my father-in-law being an old man there, I thought of getting the place for him, and when Mr. Waggoner, who was working under Mr. Finlay, who was the division manager for Waters-Pierce Oil Company at Galveston, came, I told him I wanted to get the place for my father-in-law, and he told me that he would give it to him if I would agree to supervise it and attend to the office work. He attended to the oil-house, but I attended to all the writing, &c., and all the business part of it, and kept the books. I got all of the mail out of the office, opened it, and answered it for him. Everything came through me and was answered by me. I know Mr. Arthur M. Finlay's handwriting.

The following letter was then shown the witness, and he answered that the signature thereto was in the handwriting of Arthur M. Finlay. The letter is as follows:

Waters-Pierce Oil Company; Arthur M. Finlay, manager.

GALVESTON, TEXAS, *Jan.* 12, 1891.

129 Mr. S. L. Pegues, ag't, San Marcos, Texas.

DEAR SIR: Letter from Mr. W. C. Dugger in your behalf, of the 9th, received and carefully noted.

We mailed commissions for Nov. and Dec. Friday, and you should have received them Saturday.

We want you to put in effect immediately the 10c. price to customers who will retail Brilliant oil at 12½c. or 2 gallons for 25c. Do not delay this any longer. It will be necessary to make an active fight to satisfy Mr. Nott and others that they cannot run the oil business in San Marcos. We have always treated dealers fairly, and, all things considered, we are selling them oil at reasonable enough prices.

We inclose statements of our accounts against M. E. Townsend and Yost, and will be very glad if you will take proper steps to secure us. If the firms have assigned, file our claims and see that we are protected equally with other creditors.

We fully appreciate that you attend to the principal part of our business for your father-in-law, and think that he should divide commissions with you. We certainly cannot afford to pay any more commission than we are now doing.

We send you today some plain stamped envelopes.

Yours truly, ARTHUR M. FINLAY, *Mgr.*

This letter came through the post-office to me by due course of mail. I got this letter about the second day after it was written and it was in answer to a letter written by me. In pursuance of these instructions, I went around town and made contracts with all but about three merchants in the town to sell them oil at 10 cents a gallon and stipulated that they should sell it at a particular price. The number of merchants I made this contract with
130 was about 10 or 15. They were to get all their oil from us at 10 cents a gallon and they were to retail it at 12½ cents a gallon. These merchants agreed to that, and the oil was delivered in pursuance of that contract. I had it delivered. That arrangement went on for five or six weeks until the competitive oil was exhausted. The occasion of this contract with the merchants was because some oil was brought in there by the Eagle Refining Company, competitive oil shipped in by two or three parties. Some of the merchants there had this competitive oil for sale. I wouldn't sell those merchants who had this competitive oil at this figure. Some of them applied to me for oil. I refused them. Mr. B. Daley tendered me the money, and I refused to sell him oil. This was in pursuance of verbal instructions given to me by Mr. Waggoner. He was the division auditor of the Galveston agency and was the next man to Mr. Arthur M. Finlay. He was the man who checked up the warehouses, looked over the books, &c. I had observed and obeyed his previous instructions. Mr. Waggoner was the man who established the agency there and made the contract with me, and he instructed me to do this and how to do it, and I acted in accordance with his instructions. I made my reports directly to Mr. Finlay at Galveston. Mr. Finlay never objected to any of my acts done in obedience to the instructions of Mr. Waggoner. (The defendants objected to this part of the testimony of the witness because the question and answer implied the statements of the contents of a writing and it was for the jury to form their own inference, it not being competent for the witness to testify as to the contents of written instructions to him. The court overruled the objection, and defendants excepted.) Mr. Finlay never objected to any of my acts done in pursuance of Mr. Waggoner's instructions. I made the orders for the oil kept in stock at San Marcos. We got the selling prices from Galveston. They came from Galveston. I had the general management of the business at San Marcos in the absence of any specific directions. Mr.
131 Waggoner told me not to sell any man that had the other oil. He told me to refuse. Waggoner's instructions were to sell to nobody who was buying competitive oil. There was a whole car of this competitive oil in there in barrels. There were about

four merchants interested in the car, and he told me not to sell any of them that was so interested in this car. This 10-cent price staid up about six weeks; my recollection is about five or six weeks. This occurred more than once. It occurred twice while I was representing the Waters-Pierce Oil Company, according to my recollection. Once I cut a car out that didn't get in town. I did this by getting two merchants to sign a telegram cutting out their orders for competitive oil. I think I got instructions to do that from Mr. Finlay. Mr. Taylor, of San Marcos, was one of these merchants. I don't recollect whether Mr. Hopgood was one or not. I think he refused to do it. There were two of them, and I think one was Daley. I gave them five dollars to send the telegram; gave them oil at the same price and left it in the warehouse and guaranteed measures; the five dollars to send the telegram to George Rice, at Marietta, Ohio, to keep this oil out, and the Waters-Pierce Oil Company paid for the telegram to do it. I think the Waters-Pierce Oil Company paid $5.00. I could show by my record. The Waters-Pierce Oil Company furnished these gentlemen the oil on the terms and conditions I had contracted with them and carried out my contract. Since I quit the Waters-Pierce Oil Company there has been another oil fight there. We had it there for two years. I worked for my father-in-law as agent from 1890 to January, 1893, when Mr. Finlay wanted me to drop out my father in law's name and run it in my name. I continued working for them about four or five months, and then I quit them and went to the Rocky Mountain Oil Company. The first fight was, I think, in January, 1891. The second fight was six or eight months afterwards. Since I left the Waters-Pierce Oil Company they have had a fight on at San Marcos nearly all the time. There is none there now. What
132 brought on the second fight was that Mr. Waggoner quit the Waters-Pierce Oil Company and went to the Rocky Mountain Oil Company and began selling oil. The third fight was begun in the following manner: After I quit the Waters-Pierce Oil Company and started to work for the Rocky Mountain Oil Company I shipped in oil, and we had it up and down for nearly a year, and finally they got the best of me. They bought the Rocky Mountain Oil Company out.

Cross-examined:

I induced the Waters-Pierce Oil Company to employ my father-in-law. They wanted to make a change there and wanted an agent. There were two or three parties who had applied for it. My father-in-law was an old man and had nothing to do. Mr. Waggoner came to me, I think, but I am not positive—probably I met him—and the understanding between us was that I was to oversee the business. I asked Mr. Waggoner to appoint my father-in-law as agent; he agreed to do it. My recollection is, we continued in that business from some time about the latter part of 1890 to March, 1893, about 3 years. My father-in-law's commissions run from $20 to $35 a month or $36 and $37, I think. He got a commission and so much a barrel or so much a gallon; sometimes they were tha

much and sometimes lower. The way the attorney general got that letter from Mr. Finlay, there was an interrogatory in there (referring to his deposition previously taken) asking for it. I wrote to the attorney general and answered the communications that he wrote to me. They found out in the attorney general's office that I had been in a fight with the Waters-Pierce Oil Company and found me like you find a witness in any other case. Mr. Finlay told me to stop the car of oil. I stopped it by having it cut out. I have a telegram at home now to that effect. I wired Mr. Finlay about it, and he wired me to see that it was cut out, and I did.

Mr. Finlay told me in that telegram by all means to keep the car of oil out. He didn't tell me how to do it, but left that with
133 me. He didn't tell me to offer anybody $5, but I had reason to believe that he would pay it. He never told me so. He didn't say a word about it. I did it on my own notion as local agent working for the company. Of my own accord I offered these merchants $5 in a business way in order to keep that car of oil out. I could show you where they paid a heap more than that. I don't know whether I could name the merchants at San Marcos who agreed with me in the first fight to sell the Waters-Pierce oil. It was every man in town except four, but there were merchants there then who are not in business now. I would not undertake to give their names. D. L. Edwards, who is out of the oil business, was one; Johnson & Johnson another; H. Hardy another; Smith & Watkins, who are out of business, another. I don't know who else. These are all that I can recollect. I have been engaged in fighting the Waters-Pierce Oil Company ever since I quit working for them. I have not been fighting them for the last six or eight months, because they have got me done up. I got licked; but up to that time I have been fighting them constantly for about two years. I represented myself in that fight. I bought the oil and sold it. I dealt with Gregg at Toledo, Ohio, and with George Rice and some Pennsylvania firm; in fact, wherever I could buy the oil cheapest. I couldn't tell how many car-loads of oil I shipped into San Marcos since 1893; can't even approximate. Certainly as many as five, and I expect close on to 20. The oil consumption of the town, when I had charge of the Waters-Pierce Oil Company's business, was about 12,000 gallons per month on an average. I could not specify how many cars I shipped in there during the last four years unless I could refer to my books. I have been engaged since 1893, about four years, in an active war upon the Waters-Pierce Oil Company, but they have put in a tank there and a tank wagon and have the business down where oil can be shipped in so cheap by them that they cannot be undersold and nobody would want a gallon of the other oil at the price it takes to get it there. They
134 had more capital than I had. They had better facilities than I had. I cannot say that they were able to do a better part by the merchants than I was, for if I had had a tank I could have sold oil as cheap as they could. I did not do it. I was afraid to do it. I had too much sense to do it. The Finlay I allude to is Arthur M. Finlay. He was manager of the business of the Waters

Pierce Oil Company at the time for the Galveston division. I don't know what this Galveston division embraced. I think there were two or three divisions at that time in Texas, but I don't know what territory each one embraced. He had charge of the Galveston division which embraced west Texas.

Redirect examination:

I know of some other times where cars were cut out by me. I generally negotiated about cutting out the cars of other oil with the merchants who bought it. They would cut out enough orders to bust it up. I had negotiations with the merchants to countermand orders for oil. The car I have mentioned is the only car of oil I cut out while I was with the Waters-Pierce Oil Company. I got orders for oil in less than car-load countermanded several times. This was done at the instance of Mr. Finlay and afterwards of Mr. Waggoner. The way that I got the orders countermanded would be that I would go to the merchants who had bought the other oil and offer the same grade of our oil to them a little bit cheaper. I would talk them out of it. At the time I offered them cheaper oil there was a condition that they should not buy oil from any other company. This was on local shipments from San Antonio. Mr. Waggoner, after he had quit the Waters-Pierce Company and was selling oil for the Rocky Mountain Company, offered to sell oil at 14 cents to Griffin Bros., and I went to them and sold them the same grade of oil at 11 cents, and to about five other merchants at the same price, with the understanding that they would not buy any more oil from Mr. Waggoner. These prices were allowed me on settlement
135 with the Waters-Pierce Oil Company. They were given to me on a postal card. Waggoner quit the employment of the Waters-Pierce Oil Company before I did and became the agent of the Rocky Mountain Oil Company. I have information as to the cost of oils in the markets, and had such information at that time. There are different grades of oil, with different prices. The cheapest grade is about 8 or 9 cents. The best oil was worth about 11 or 12 cents in the markets at Cleveland and Toledo, Ohio. These were the delivery prices, delivered at San Marcos. Those figures constituted the cost when the oil fight began. These oils were being sold by the Waters-Pierce Oil Company; their best oil at from 17 to 23 cents in that market. When the Rocky Mountain Oil Company and the Eagle Refining Company were driven out, the prices of the Waters-Pierce Oil Company went back to the old prices of 17 or 18 cents.

JOHN HARGRAVE testified for the State by deposition, taken September 28th, 1896, as follows:

My name is John Hargrave. My residence is Mt. Pleasant, Titus county, Texas, and my occupation is a grocery merchant. I have dealt in oil and am now dealing in oil. I purchased my oils from the Waters-Pierce Oil Company. This oil is being sold here at Mt. Pleasant at present, and I don't know how long it has been sold here. I know of oils having been brought to our town and sold or

offered for sale in competition with the Waters-Pierce Oil Company since July 31st, 1889. I don't know what the price of the Waters-Pierce oil was to the merchant, but the price to the consumer was lower when this competitive oil came in than before their introduction. The price of the Brilliant brand of the Waters-Pierce oil declined from 18 to 11 cents per gallon retail, and the decline continued as long as any of the competition oil remained on this market. The price of Brilliant oil before the competitive oil was put on this market was 15 cents wholesale, and after the competing oil was off of the market the price of the same brand of oil was 18 cents wholesale. The Waters-Pierce Oil Company have a storage tank here at Mt. Pleasant. The tank has been here not exceeding twelve months. I don't remember the exact length of time. I don't know its capacity. I don't know how the tanks are filled; neither do I know how the oil is drawn from the tanks to supply the trade. The Waters Pierce Oil Company have a warehouse in which they store packages of iron barrels holding about 50 gallons, and also in jacket cans holding about five gallons each, and they are distributed in unbroken packages. There are no other companies who have tanks or warehouses here, nor do I know of any oil being regularly sold in any place or town in Texas in competition with the Waters-Pierce Oil Company, nor do I know in what towns in Texas the Waters-Pierce Oil Company have tanks and warehouses for the storage of oil. I have received rebates from the Waters-Pierce Oil Company. I have received a rebate of one cent per gallon on all oil bought of the Waters-Pierce Oil Company from May 27th, 1895, to August 31st, 1896.

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(Defendants objected to any testimony of the witness as to rebates because the giving of rebates was not violative of any law of the State of Texas, and the evidence was therefore immaterial and irrelevant and did not tend to prove any issue in the cause. The court overruled the objection, and defendants excepted.)

The reasons that I have received the rebates were that I claimed that I was entitled to a rebate, because I handled a large quantity of the Waters-Pierce Oil Company's oil. There were no conditions attached to the rebates. While the merchants who handled Waters-Pierce Oil Company's Brilliant oil were selling it to the consumers at 11 cents per gallon, their local agents refused to sell the same brand of oil to me for less than 15 cents per gallon. To the best of my recollection, it was in January, 1895, in the town of Mt. Pleasant. The circumstances were as follows: I saw the local agent of the Waters-Pierce Oil Company and told him I wanted some oil, and asked him what his prices were, and he told me it was 15 cents per gallon, and I asked him why he asked me 15 cents per gallon when others were retailing the same oil at 11 cents per gallon, and he said he had instructions from headquarters at Marshall not to sell oil at reduced prices to merchants who were selling the competition oil.

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(The defendants objected to this testimony of the witness because discrimination was no offense against the laws of the State of Texas,

and such evidence did not tend to prove any issue in the cause, and was therefore irrelevant and immaterial. The court overruled the objection, and defendants excepted.)

F. M. RAMSEY testified for the State by deposition, taken September 30th, 1896, as follows:

My name is F. M. Ramsey. I reside in Laredo, Webb county, Texas, and am engaged in the feed and grocery business; have dealt in oil and purchased my oil from the Waters-Pierce Oil Company. The Waters-Pierce Oil Company has sold oil in Laredo for fourteen years, within my knowledge; how much longer I don't know. I know of other oils having been brought to Laredo and sold in competition with the Waters-Pierce Oil Company since July 31st, 1889. Competitive oils did not continue to be sold in Laredo, but ceased to be sold because it was to the disadvantage of the parties handling other oils. The Waters-Pierce Oil Company have storage tanks in this town, but I do not know how long they have been here or the capacity of such tanks, nor do I know by what process the tanks are filled or supplied with oil. The Waters-Pierce Oil Company also has a warehouse for the storage of oils in packages, but I am not familiar with their methods of distribution of their packages to customers. I am not acquainted with the method of preparing for shipment of the Waters-Pierce Oil Company of these packages of oil. There is no other company here except the
138 Waters-Pierce Oil Company which has a tank or warehouse in this community, nor do I know of any oil being regularly sold in this town now in competition with the Waters-Pierce Oil Company. I do not know whether the Waters-Pierce Oil Company has ever made a discrimination in prices against others than myself. I have never entered into any agreement with the Waters-Pierce Oil Company or its agents by the terms of which I was not to sell any competitive oil and was to deal exclusively with the Waters-Pierce Oil Company, nor could I testify that any one else had entered into any agreement with the Waters-Pierce Oil Company by the terms of which they were to buy oil exclusively from the Waters-Pierce Oil Company.

W. C. BURR testified for the State by deposition, taken October 31st, 1896, as follows:

My name is W. C. Burr. I reside in Laredo, Webb county, Texas, and my occupation is that of grocer and feed dealer. I deal in oils at the present time and purchase the same from the Waters-Pierce Oil Company. The Waters-Pierce oil is sold in Laredo. I have known of its being sold here for nearly eight years past; ever since I have been in Laredo. I know also of other oils being brought to Laredo and sold in competition since July 31st, 1889. Yes; there were changes made in prices of Waters-Pierce oil after the introduction of competitive oils for sale here. The prices declined while the competitive oil was being sold, but I don't remember how much the decline was. The decline has continued from the introduction until the present time. I don't remember the exact price before or after

competitive oil was put on the market. The Waters-Pierce Oil Company have stationary tanks here. The oil is shipped here in large tanks on board railroad cars and is transferred from these car tanks by oil pumps to stationary tanks in Laredo. The oil is drawn to supply the trade from these stationary or main
139 tanks in Laredo by means of a faucet into 50-gallon tanks; also the oil is drawn into a large tank on wheels for the purpose of supplying the retail dealers in this town. The Waters-Pierce Oil Company have a warehouse here in which to store oils in packages. These packages are 5-gallon cans, 2 cans in a case, and are hauled in wagons and drays to the dealers in oils. I do not know their methods of preparing oils for shipment. No other company except the Waters-Pierce Oil Company has a warehouse or tanks in this community. I know of no other oils being sold in this town at the present time except the Waters-Pierce oils, nor do I know of any oil being regularly sold in any place or town in Texas in competition with the Waters-Pierce Oil Company. The Waters-Pierce Oil Company's agent, Richards, refused at one time to sell me oil as cheap as it sold to others at that time because I was then handling competitive oils. This was about three years ago at my grocery store in Laredo, Texas.

(The defendants objected to this answer of the witness because the same was irrelevant, immaterial, and incompetent, in that a refusal on the part of the Waters-Pierce Oil Company to sell the witness oils, and for the reasons stated, constituted no violation of the laws of the State of Texas, and said evidence did not tend to prove any issue in the case; which objection was overruled by the court, and the defendants excepted.)

C. A. LAWLOR testified for the State by deposition, taken April 1st, 1897, as follows:

I am 41 years of age; my occupation is merchandising; my place of residence is Jacksonville, Cherokee county, Texas. I have resided at my present place of residence for the past ten years. I have been in the mercantile business here for the past ten years, during the whole of which time I have been a retail dealer in kerosene oil. The Waters-Pierce Oil Company was doing
140 business in Jacksonville when I came here and are still doing business here. The company does a wholesale business here in kerosene oil, axle grease, &c., through a local agent. I have been purchasing kerosene oil from time to time from the Waters-Pierce Oil Company ever since I have been here up to March 11th, 1897. Since that date I have done no business with them.

R. C. BRADEN testified for the State by deposition, taken September 29th, 1896, as follows:

I live in Seguin, Guadalupe county, Texas. I have been in the mercantile business in Seguin, Guadalupe county, Texas, from March, 1892, until August, 1896. From March, 1892, until August, 1896, I dealt in oils all the time. I am not now dealing in oil. I

sold my business in August, 1896, but while in business I purchased most of the oil I sold from the Waters-Pierce Oil Company; the rest I bought from George Rice, of Marietta, Ohio. The Waters-Pierce oil is sold here and has been here ever since I have been in Seguin. I moved to Seguin in 1890. George Rice, of Marietta, Ohio, has sold oil in Seguin since July 31st, 1889. The Waters-Pierce Oil Company has one storage tank at Seguin, and the said tank has been here about four or five years and its capacity is about six thousand or eight thousand gallons. I don't know by what process the tanks are filled or supplied with oil. They have a warehouse at Seguin also, and they store oil*d* in five-gallon cans and in fifty-gallon iron barrels, and the local agent delivers the oil to the merchants in town. I am not acquainted with the method of preparing for shipment by the Waters-Pierce Oil Company of the packages of the oil referrred to, neither do I know where the packages are put up. There is no other oil company who have tanks or warehouses in or near Seguin, and there is no other oil sold here in competition at present. I do not know of any oil that is regularly sold in any place in Texas in competition to the Waters-Pierce Oil Company.

141 The Waters-Pierce Oil Company have tanks and warehouses in Seguin and had them in San Antonio, Columbus, Houston, and Galveston, and I suppose they have them at the three last-named places yet, but I do not know that they have. I never received from the Waters-Pierce Oil Company or any of its agents any rebate from the regular prices of any oils I purchased from them. I never received any rebates from the Waters-Pierce Oil Company. About the last of October or the first of November, 1895, I purchased from Henry Terrell's Sons one barrel of the Marietta oil at 17½ cents per gallon, and the Waters-Pierce Oil Company's local and travelling agents came into my store in Seguin, Guadalupe county, Texas, and seeing I had a barrel of the Marietta oil in stock, the travelling agent asked me what I paid for said oil. I told him 17½ cents per gallon. He asked me why I bought the Marietta oil. I told him because it — cheaper and his company would not meet the price, and he said there was no use of meeting the price until the competitive oils were on the market and ready for sale. I had bought one barrel of oil from the Waters-Pierce Oil Company about one week before the first car of the competitive oils were received in Seguin. In the meantime the first car of the competitive oil had arrived and was placed on the market at 17½ cents per gallon, and when they offered the competitive oils for 17½ cents per gallon I wrote the Waters Pierce Oil Company, asking them to give me a rebate or reduction on the oil I had purchased from them about one week before the competitive oil was placed on the market in Seguin, and to that letter I received no answer, but the agent came to my store afterwards and proposed to make the price of the oil I had left of the Waters-Pierce oil at 13 cents per gallon if I would roll the Marietta oil out of the store and not handle it at all, and thereby I would be placed on an equal footing with the rest of the merchants who were still selling the Waters-Pierce oil only. I

told him I had bought the Marietta oil and I would not roll
142 it out or return it to the merchant from whom I had bought the same, but I would keep the Marietta oil and sell it, and he could do as he pleased about giving me a reduction on the oil I had bought from the Waters-Pierce Oil Company, but he refused to give me any rebate or reduction unless I would return the Marietta oil and agree not to handle it in the future. (Defendant objected to the testimony as to this transaction on the ground that it appeared that the minds of the parties never met, and that there was no agreement, and because it was a mere conclusion of the witness, and was therefore for these reasons irrelevant and incompetent testimony. The court overruled the objections; to which the defendants excepted.) After I had sold the first barrel of Marietta oil I met the local agent and asked him to bring me a barrel of Waters-Pierce oil, and he told me he could not sell me any oil at the price he was selling same some other merchants in Seguin, because they, the other merchants, were handling Waters-Pierce oil only and I was and had been selling the Marietta oil. He was selling to the first-named class of merchants at 13 cents per gallon, but asked me 18 cents per gallon. I told him I couldn't give the price, as I couldn't compete with other merchants, and while the Waters-Pierce Oil Company didn't refuse to sell me oil, yet they asked me five cents per gallon more than they were selling to other merchants in Seguin who never handled the competitive oils.

(The defendants objected to this testimony on the ground that same was irrelevant and immaterial, in that there was no law of the State of Texas to prevent the Waters-Pierce Oil Company from discriminating and selling to whom it pleased and at such prices as it pleased. The court overruled the objection; to which the defendants excepted.)

Some time during the six months that the Marietta oil was sold in Seguin a second agent of the Waters-Pierce Oil Company, whose name I do not remember, came to my store in Seguin and said to me: "You ought to quit handling Marietta oils; they are
143 not as good as *good as* the Waters-Pierce oils, and the Marietta oils could not hold up in this market."

(Defendants objected to this testimony because the witness did not disclose the name of the agent of the Waters-Pierce Oil Company, and his testimony to that effect was a conclusion or opinion of the witness, and that said testimony was immaterial and irrelevant, constituting no agreement or contract within the purview of the law. The court overruled the objection; to which the defendants excepted.)

The Waters-Pierce Oil Company never refused to sell me any oil, but they refused to sell me at the same price they were selling other merchants—that is, to merchants who would handle the Waters-Pierce oil only. The local agent at Seguin, while not refusing to sell me oil, still he asked me 18 cents per gallon for oil when he was selling other merchants here oil at 13 cents at the same time.

This was the last part of the year 1895 or the first part of the year 1896, and his reasons for making said discriminations was that at said time I was selling Marietta oil at Seguin in connection with the Waters-Pierce oil. I asked him why he asked me five cents per gallon more than he was selling other merchants in Seguin, and the local agent told me that was his orders from the company and he could not do otherwise.

(The defendants objected to this evidence on the same ground as previously stated, to wit, that the same was irrelevant and incompetent and showed no agreement, nor did it show any violation of the trust laws of the State of Texas. The court overruled the objection; to which the defendants excepted.)

The Waters-Pierce Oil Company has an agent in Seguin. His name is S. P. Dibbrell. He is interested and runs the street railroad in Seguin. The Waters-Pierce Oil Company has a local agent in Seguin, Guadalupe county, Texas. While I was selling the Marietta oils in Seguin the travelling agent—I don't know his name—
144 came to my store and wanted me to put up a sign in front of my store that I would retail oil at 75 cents for a five-gallon jacket can of oil, the customer furnishing the can, provided I would handle Waters-Pierce oil, which I refused to do. Afterwards I saw the same signs up at other stores, who were handling the Waters-Pierce oil only.

(Defendants objected to this testimony because same was irrelevant and incompetent and embodied merely a proposition which was not accepted by the witness, and therefore did not constitute any contract or combination within the meaning of the law in restraint of trade. Counsel for the State, in opposition to the objection, gave as reasons for the testimony offered, first, it showed the methods of doing business, though the offer was not accepted; and, second, it showed the circumstances that other merchants in the town did accept the proposition, and therefore the contract was completed by some of them. The court overruled defendants' objections; to which defendants excepted.)

The Waters-Pierce Oil Company, through its travelling agent, tried to make an agreement with me to handle their oils only, but I refused to enter into any such agreement with them.

(The defendants here renewed their objection to this part of the testimony of the witness on the same ground as stated above. The court overruled the objection, making the following statement: "I will state that all this testimony is only admitted and will be restricted as circumstances throwing light upon the question whether any real contract has been made of this character." The court overruled the objection, and the defendants excepted to the ruling.)

I have not nor do I know of any one entering into any agreement with the Waters-Pierce Oil Company, or any of its agents, by the terms of which they were to buy oil exclusively from the Waters-

'Pierce Oil Company. As I said before, the Waters-Pierce Oil
145 Company sent an agent to our town and he came to my store about the last of the year 1895 or the first part of 1896 and told me if I would handle their oils exclusively he would place me on an equal footing with these merchants in Seguin, who were selling their oils only—that is, he would sell me oil at 13 cents per gallon and then I could put up the sign he had been talking to me about, and if I would agree to handle the Waters-Pierce oil exclusively I could then sell my customers five gallons of oil for 75 cents, and I refused to do so. I have been offered inducements in other lines in the way of rebates, but have never, that I now remember of, been asked by any one of the dealers in the other lines to handle their goods exclusively. It is an every-day custom in trade to be offered inducements in the way of rebates in almost every line, yet I cannot remember of ever being asked to handle any line exclusively. In my observation I find many business men offer special inducements in particular cases to promote their trade. At the time the Waters-Pierce Oil Company discriminated against me in prices I had not combined with any one in a hostile enterprise against the business and trade of the Waters-Pierce Oil Company, nor have I ever endeavored to injure the Waters-Pierce Oil Company or its business in any way, either jointly or singly. Some time in October, 1895, several merchants in Seguin bought a car of oil from an agent for George Rice, of Marietta, Ohio, at 17½ cents per gallon delivered, and when the oil arrived at the depot I bought one barrel of said oil out of the first car from Henry Terrell's Sons, a firm doing business in Seguin, Guadalupe county, Texas, and paid them for said oil 17½ cents per gallon, and at the same time Waters-Pierce Oil Company was selling oil at 18 or 21 cents per gallon, and before the said barrel was all sold I went to the local agent of the Waters-Pierce Oil Company to buy a barrel of oil from him and he told me he would sell me the oil for 18 cents per gallon; that he could not sell it to me at the same price he was sell-
146 ing oil to the merchants in Seguin who were not handling the Marietta oils. The price made to merchants in and around Seguin, who were handling the Waters-Pierce oil exclusively, was 13 cents per gallon.

(The defendants objected to this testimony on the grounds previously stated, to wit, that the said testimony was incompetent and irrelevant and did not tend to prove any issue in the case, in that the Waters-Pierce Oil Company had a right to refuse to sell to any one they pleased and had a right to charge such prices as they might see fit without violating the laws of the State of Texas in the matter of trusts and combinations against trade. The court overruled the objection; to which the defendants excepted.)

The State next offered in evidence certified copy of the articles of incorporation of the Eagle Refining Company of Ohio, which is as follows:

STATE OF OHIO:

Articles of Incorporation of the Eagle Refining Company.

The undersigned, William A. Smith, Robert B. Turnbull, Willard O. Cameron, Arthur S. Lawrence, and A. G. Carpenter, citizens of Ohio, hereby associate themselves to become a body corporate, in accordance with the laws of said State, under the following articles:

1. The name of the said corporation shall be the Eagle Refining Company.

2. Said corporation shall be located and its principal business transacted at Cleveland, Ohio.

3. The purpose for which said corporation is to be formed is to manufacture, refine, compound, purchase, and deal in all kinds of oils and greases, petroleum and its various products, and all things incident thereto, for profit.

147 4. The capital stock of said corporation shall be fifty thousand dollars, divided into five hundred shares of $100.00 each.

In witness whereof they hereunto set their respective hands this 28th day of December, A. D. 1897.

WILLIAM A. SMITH.
R. B. TURNBULL.
WILLARD O. CAMERON.
ARTHUR S. LAWRENCE.
A. G. CARPENTER.

STATE OF OHIO, *Cuyahoga County,* } ss:

Personally appeared before me, a notary public, the above-named William A. Smith, Robert B. Turnbull, Willard O. Cameron, Arthur S. Lawrence, and A. G. Carpenter, who severally acknowledged the signing of the above articles of incorporation to be their free act and deed.

In witness whereof I hereunto set my hand and official seal, at Cleveland, this twenty-eighth day of December, A. D. 1887.

[SEAL.] C. C. YOUNG,
Notary Public.

THE STATE OF OHIO, *Cuyahoga County,* } ss:

I, Henry W. Kitchen, clerk of the court of common pleas, a court of record of Cuyahoga county aforesaid, hereby certify that C. C. Young, before whom the annexed acknowledgment was taken, was at the date thereof a notary public in and for said county, duly authorized by the laws of Ohio to take the same; that I am well acquainted with his handwriting and believe the signature thereto is genuine.

In testimony whereof I hereunto subscribe my name and
148 affix the seal of said court, at Cleveland, this 28th day of December, A. D. 1887.

[SEAL.] HENRY W. KITCHEN, *Clerk.*

UNITED STATES OF AMERICA, }
State of Ohio. }

OFFICE OF THE SECRETARY OF STATE.

I, J. S. Robinson, secretary of state of the State of Ohio, do hereby certify that the foregoing is a copy, carefully compared by me with the original now in my legal custody as secretary of state and found to be true and correct, of the articles of incorporation of the Eagle Refining Company, filed in this office on the 29th day of December, A. D. 1887, and recorded in volume 45, page 63, of the Records of Incorporations.

In testimony whereof I have hereunto subscribed my name and affix my official seal, at Columbus, the 29th day of December, A. D. 1887.

[L. S.] (Signed) J. S. ROBINSON,
Secretary of State.

THE STATE OF TEXAS, }
Department of State. }

I, Allison Mayfield, secretary of state of the State of Texas, do hereby certify that the within and foregoing is a true and correct copy of the articles of incorporation of the Eagle Refining Company, with the endorsements thereon, now on file in this department.

Witness my official signature and the seal of State, affixed at the city of Austin, this the 29th day of January, A. D. 1896.

[L. S.] ALLISON MAYFIELD,
Secretary of State.

JOHN B. KLEPPER testified for the State by deposition, taken February 16th, 1897, as follows:

149 My name is John B. Klepper. I reside in Plano, Collin county, Texas. My occupation is at present that of drayman. I was at one time in the employment of the Waters-Pierce Oil Company. I was their agent at Plano, Texas. My employment by them began, to the best of my recollection, in the spring of 1892 and ended the 27th day of August, 1896. The Waters-Pierce Oil Company has at this place a tank or reservoir ten feet in diameter and 30 feet long. Their oil is kept in this tank or reservoir and as the customers of said company desire to purchase oil it is drawn from the large tank into iron barrels owned by the company and delivered to the purchaser, the barrel, of course, to be returned. There is now a tank or reservoir at this place, Plano, Collin county, and a similar tank at McKinney, Collin county. I think there are two tanks in McKinney, one for Brilliant oil and one for Eupion oil. I also think there is one tank in Farmersville, Texas, Collin county.

J. L. LEWIS testified for the State by deposition as follows:

My name is J. L. Lewis. My residence is in Lockhart. My occupation is commission merchant. I have dealt in oil. I am not now dealing in oil. The Waters-Pierce Oil Company is selling oil in our town. I cannot say how long they have been selling it here, but they have been selling it as long as I can remember. I do know of oil having been brought to our town and sold in competition to the Waters-Pierce Oil Company since July 31st, 1889. The competitive oil did not continue to be sold in our town. I discontinued the sale of oil in the spring of 1895, some time about April or May. The Waters-Pierce Oil Company have storage tanks in this town, the capacity of which I do not know. They have one tank which, to the best of my memory, has been here two years. They did have two other tanks, which I sold them some time in April or May, 1895. These two tanks had a capacity of about 3,600 gallons each. I do not know that they still own them. I
150 do not know by what process they fill these tanks nor by what process they draw the oil from them to supply their trade, as I was never present when they filled or emptied them. The Waters-Pierce Oil Company has or did have a warehouse in this town where they stored oil in packages. I have seen them handle oil here in cases of two five-gallon cans and in jacket five-gallon cans and in cases of one gallon, 10 or 12 in a case. They distributed these packages to their customers in an ordinary wagon or dray. I know nothing of the Waters-Pierce Oil Company's method of preparing these packages nor where they are prepared. I know of no other oil company that has tanks or warehouses in this community. I know of no oil being sold in competition to the Waters-Pierce Oil Company in this community. I do not know of any oil being regularly sold in any place or town in Texas in competition with the Waters-Pierce Oil Company. I have seen the Waters-Pierce Oil Company's tanks in San Marcos and in this town. I might have seen them at other points, but I cannot swear that I have. I never purchased any oil from the Waters-Pierce Oil Company. As stated above, I have never bought any oil from the Waters-Pierce Oil Company. The Waters-Pierce Oil Company or its agents have never refused to sell me oil, as I have never tried to buy any from them. There was an agent of the Waters-Pierce Oil Company in our town up to the time I discontinued selling competitive oil, in the spring of 1895, and I suppose one is there yet, but, as I have not been interested in the oil business since that time, I have paid no attention to it. The name of the party who did represent them was Mr. E. M. Story. He was also engaged in the transfer business and was mayor of the city of Lockhart. There was an agent of the Waters-Pierce Oil Company at Lockhart and other agents of the company have also visited said town at different intervals during 1894 and 1895. I do not know prior or since that time as I paid any attention to the oil business, except during that time. I do not know under what
151 circumstances nor for what purpose said agent came. During the time mentioned the Waters-Pierce Oil Company had

two different agents visit this town, one a Mr. Keenan and the other a Mr. McKean. Mr. McKean, so far as I know and as he stated to me, was here to control the oil fight and to arrange plans to force me to discontinue the selling of competitive oil. I can say while he was here he made a retail price for oil and nailed it up conspicuously on the front door of Mr. W. N. Hudson's store. This was prior to the time I discontinued the sale of competitive oil, and was, I think, during the spring of 1895. On this price-list he made a reduction of about ten cents a gallon in the retail price of oil, and Mr. W. M. Hudson retailed oil accordingly. I have been approached by solicitors of the Waters-Pierce Oil Company and offered inducements to discontinue the sale of oil in competition with them. I was approached by Mr. Keenan at several times during the years 1894 and 1895, more especially during the year 1895. It was at my office in this town. I cannot state all the conversation fully, as I do not remember it distinctly, but it was to the effect that we discontinue the sale of oil in competition with the Waters-Pierce Oil Company, and he offered me inducements in the way of money consideration to induce us to discontinue the sale of oil, and threatened that if we did not discontinue said sale that the Waters-Pierce Oil Company would put on a fight—that is, cut prices on oil below what we could sell at—and thereby force us to discontinue the sale.

(The defendants objected to this portion of the testimony of the witness on the ground that it was incompetent and irrelevant and did not tend to establish any issue in the cause, in that no arrangement was consummated nor any combination or contract made. The court stated that the evidence would be admitted for the limited purpose of showing the methods of business of the Waters-Pierce Oil Company, and overruled the objection; to which the defendants excepted.)

152 K. E. DUNNING testified for the State by deposition, taken November 5th, 1896, as follows:

My name is K. E. Dunning, and I am a resident of Brown county, Texas, and by occupation a merchant. I have dealt in oils. At present I am not dealing in oils, though for the last eight years up to January, 1896, I was. The Waters-Pierce Company's oil is sold in Brownwood. It has been sold there ever since 1888, to my knowledge, and I don't know how long before that. Other competitive oils have been sold here by the Cleveland Refining Company since 1889. The competitive oils were sold here up to the time I went out of business last January. The Waters-Pierce Oil Company has oil tanks here. I do not know their capacity. They have been here about eight years. I do not know how the tanks are filled. I do not know how the oil is drawn from them. The oil is distributed to the trade in town by tank wagon. The Waters-Pierce Oil Company has a warehouse to store oil in in packages at this place. The packages are boxes, 2 5-gallon tin cans in each, and jacket cans. They are distributed to customers in wagons as desired. I do not know how the oil is prepared for shipment. No other oil companies have warehouses or tanks in this community

that I know of. I do not know of any oils being regularly sold here except the Waters-Pierce Oil Company's oil, though occasionally the Cleveland Refining Company sells oil here. Of my own knowledge I do not know of any oil being regularly sold in any place or town in Texas in competition with the Waters-Pierce Oil Company. The only tanks I know of belonging to the Waters-Pierce are in Brownwood and Dublin, in Erath county. I handled other oils in competition with the Waters-Pierce Oil Company. The Waters-Pierce Oil Company did interfere with my sales of other oils by refusing to sell me their oil. The Waters-Pierce Oil Company's agents have refused to sell me oil because I was handling other oil.

It was in October, 1895, in the town of Brownwood, Texas.
153 It was customary for the Waters-Pierce Oil Company's wagon to come around once or twice a week on certain days, and after their agent ascertained that I was selling other oils the wagon stopped coming to my store. I then saw the agent of the Waters-Pierce Oil Company and asked him why the wagon stopped coming to my store, and he said he was instructed by his company not to sell parties oil that were handling other oil.

(The defendants objected to this testimony on the grounds, first, that witness did not disclose the agent's name, so as to enable the defendant to investigate the truth or falsity of the statement; second, that the evidence was incompetent and irrelevant, in that it did not tend to prove any issue in the case, as the Waters-Pierce Oil Company, without violation of law, could refuse to sell the witness oil for any reason satisfactory to said company. The court overruled the objections; to which the defendants excepted.)

The Waters-Pierce Oil Company have refused to sell me oil because I was handling other oils. I was not engaged in a fight against the Waters-Pierce Oil Company. It was never my intention to injure their trade at all, and that is not the reason their agent refused to sell me oil.

(The defendants objected to this part of the testimony of the witness for the reason stated above; which objection was overruled by the court; to which the defendants excepted.)

G. F. WEAR testified for the State by deposition, taken November 5th, 1896, as follows:

My name is G. F. Wear. I reside in Brownwood, Brown county, Texas, and am a merchant. I have dealt in oil and am now dealing in oil and buy it now from Waters-Pierce Oil Company. The Waters-Pierce Oil Company is selling oil at Brownwood. I don't know how long it has been so selling there. There have been other oils sold here in competition with the Waters-Pierce Oil
154 Company since 1889. No other oil except the Waters-Pierce oil has been sold here since last spring, and since then the price of oil has advanced as high as five cents a gallon. The Waters-Pierce Oil Company have tanks here, though I do not know how long they have been here nor their capacity. They pump the oil from the tank on the car into the tanks here and draw from the

stationary tank into tanks on the wagons to supply the trade around town. It also has a warehouse here to store packages of oil. The packages are in five-gallon cans, 2 to the case, and distributed to customers from drays as desired. I am not acquainted with the method of preparing the oil for shipment except from this place, which is shipped in iron barrels filled from these tanks. No other oil companies have tanks or warehouses here; no other oils sold here now except the Waters-Pierce oil. I do not know of any oil being sold regularly in any place or town in Texas in competition with the Waters-Pierce Oil Company, nor do I know in what towns in Texas the Waters-Pierce Oil Company have their tanks and warehouses for the storage of oils. I never received any rebates from the Waters-Pierce Oil Company at all. I never got any rebate, though I was promised by their agent, J. S. Monroe, at this place, that if I would abstain from handling other oils that he would always give me as low prices on oils as competitors, if not lower.

(Defendants objected to this portion of the testimony of the witness on the grounds previously stated, to wit, irrelevant, incompetent, and immaterial; but the court overruled the objection and admitted the testimony for the limited purpose of showing the methods of business of the Waters-Pierce Oil Company; to which the defendants excepted.)

J. S. Monroe, the agent at this place of the Waters-Pierce Oil Company, offered to give me lower prices, or as low prices, than any other oil if I would handle his oil exclusively. This was done in the town of Brownwood, Texas, during the winter and spring of 1895 and 1896.

155 (The defendants objected to this testimony of the witness for the reasons stated above, in that it showed merely an offer and no acceptance, and therefore no contract or agreement in restraint of trade, and was therefore irrelevant and incompetent. The court overruled the objection; to which the defendants excepted.)

The Waters-Pierce Oil Company did interfere with me in the sale of other oils. The W*t*aers-Pierce Oil Company and the agents of the Waters-Pierce Oil Company refused to sell me oil because I bought oil from the Cleveland Refining Company and George Rice last winter and spring here in Brownwood, Texas.

(Defendants objected to this portion of the testimony on the grounds previsously stated; but the objection was overruled by the court; to which the defendants excepted.)

The Waters-Pierce Oil Company and its agents never at any time refused to sell me oil as cheap as it sold to others at the same time, though they refused to let me have it at all, and I was forced to get it through the Temple Grocery Co. at a cost of one cent per gallon and an inconvenience of pumping it from an iron barrel into my tank.

(The defendants objected to this testimony because the same was irrelevant and incompetent and tended to prove no issue in the case, for the reasons frequently stated in objection to other testimony of a similar nature. The court overruled the objection, and the defendants excepted.)

The Waters-Pierce Oil Company refused to sell me oil because I was handling other oils. I was not at all hostile towards the Waters-Pierce Oil Company nor did not wish to break down their business, and that is not why their agent refused to sell me oil.

(The defendants objected to this testimony on the same grounds as hereinbefore set forth frequently, incompetency and irrelevancy; but the court overruled the objection, and defendants excepted.)

156 F. Q. RAST testified for the State by deposition, taken October 3rd, 1896, as follows:

My name is F. Q. Rast. I reside in Cleburne, Johnson county, Texas. I am a collector. I have dealt in oil at Cleburne, Texas. At first I purchased from the Eagle Refining Company; State agent, A. W. Clem. Later I purchased from the Waters-Pierce Oil Company. I am not now engaged in the oil business. The Waters-Pierce oil is sold here at Cleburne. To my knowledge it has been sold here for four years. How much longer I cannot say. I know of competitive oils having been brought to Cleburne and sold or offered for sale in competition with the Waters-Pierce Oil Company since July 31st, 1889. The Waters-Pierce Oil Company had an oil tank here when I began to handle oil here about three years ago, with a capacity of several thousand gallons. I can't give the exact capacity. They put in a gasolene tank about thirty months ago. The capacity of the gasolene tank is about the same as the other. I don't know how these tanks are filled. A faucet is used to supply the trade. I don't think the Waters-Pierce Oil Company has a warehouse at this town. I know nothing about their method of preparing for shipment their packages of oil. No other oil companies have tanks or warehouses in Cleburne. I do not know of any oil being regularly sold in this town of Cleburne now in competition with the Waters-Pierce Oil Company, nor do I know of any oil being regularly sold in any place in Texas in competition with the Waters-Pierce Oil Company. I have no knowledge of the oil business in any town in Texas except Cleburne. I have received rebates from the Waters-Pierce Oil Company from the regular prices of oil purchased from them. This occurred in the year 1893. I don't remember exactly how much. The consideration for such rebates was that I was to handle their oils exclusively.

(The defendants objected to this testimony because of irrelevancy and immateriality, and on the grounds frequently taken as hereinbefore set out to other testimony of a similar nature; which
157 objection was overruled by the court, and the defendants excepted.)

I was approached by Mr. Monroe, agent of the Waters-Pierce Oil

Company, and offered, as an inducement to handle oils of his company exclusively, oils which he claimed to be equal to those I was at that time handling at 3 cents per gallon less than I was paying for the oils that I was handling. This was during the year 1893, in Cleburne, Texas.

(The defendant objected to this part of the testimony of the witness for irrelevancy and immateriality, in that it did not appear that any contract or agreement was made, the statement of the witness being that the defendant company only offered, through its agent, to do certain things, and therefore the evidence did not tend to prove any issue in the case. The court overruled the objection and admitted the testimony, and the defendant excepted.)

I did enter into an agreement with the Waters-Pierce Oil Company and its agents, by the terms of which I was not to sell any competitive oil and was to deal exclusively with the Waters-Pierce Oil Company. This agreement was verbal. The understanding was that, in order to have the benefit of the rebates of 3 cents per gallon, I was to handle exclusively the Waters-Pierce Oil Company's oil.

(The defendants objected to this evidence for the same reasons as were offered in objection to similar testimony and on the same grounds. Objections were overruled and the testimony admitted, and the defendants excepted.)

I cannot be more exact than to say it was in the year 1893. I state this from memory. I have no papers by which to be guided. At the time of my agreement with the Waters-Pierce Oil Company there was no war being made on the Waters-Pierce Oil Company by other dealers. I cannot be exact as to dates, but think the time was less than three years prior to the first day of January, 1893.

Everything that I have testified to in my answers hereto has been from my own personal knowledge.

158 S. G. ECKLES testified for the State by deposition, taken October 5th, 1896, as follows:

My name is S. G. Eckels; residence, San Antonio, Texas; occupation, selling coal oil for George Rice, Marietta, Ohio. I am only salesman, selling for George Rice. Yes; I have dealt in oil by handling it merely for George Rice, my principal, a dealer. The Waters Pierce Oil Company selis oil in San Antonio. I don't know exactly how long, but it has been for a number of years, to my knowledge. I know of many instances of oil being brought there and sold in competition with the Waters-Pierce Oil Company since 1889. The competition did for a time cease. The Waters-Pierce Oil Company have tanks at San Antonio. I don't know exactly when they were put there, but they have been there for a number of years. I don't know exactly what their capacity is, but their tanks are built varying in capacity from 7,500 to 15,000 gallons. This was about the average-size tanks. They have two ways of unloading their oils. They have a bottom and a top connection with

the shipping tank by means of pipes. They also have a warehouse in the town in which they store their packages, &c., such as five-gallon cans, cases, iron barrels. They deliver by wagon and also in bulk. I am acquainted with the method of the Waters-Pierce Oil Company in preparing for shipment these packages of oil. Some of these packages are put up in Dallas, which is their principal distributing point for Texas; a great many of them in St. Louis, from which place they come in car-load lots for distribution here. The Retail Grocery Co. of San Antonio, Texas, the Texas Oil and Gasolene Co., and the Waters Pierce Oil Company have tanks or warehouses in this city. The Waters-Pierce Oil Company has a warehouse or tank in every principal town of over 2,000 inhabitants. Every town of much importance as distributing point, almost regardless of the number of people in it, has a place for keeping oil.

159 D. F. HAIR testified for the State by deposition, taken September 30th, 1896, as follows:

I reside near Belton, in Bell county. I have received from the Waters-Pierce Oil Company rebates from the regular prices of oils purchased from them when I dealt in oil. I am not at present so engaged. This rebate was two cents per gallon. It was since July, 1889. It was in the fall of 1894 or spring *if* 1895. The consideration upon which I received this rebate was that I would handle only their oils and was to enable me to sell their oils cheaper than others could be sold.

T. P. STILLWELL testified for the State by deposition, taken September 30th, 1896, as follows:

I live at Lone Oak, Texas; belong to the firm of Stillwell Bros., who are engaged in general merchandise. J. S. Richards, local agent for the Waters-Pierce Oil Company, quoted Brilliant oil to us at 13 cents per gallon at the time he was selling to other dealers in Lone Oak for 10 cents per gallon. This was the latter part of April, 1895, after we had begun handling competitive oils. One reason given for this refusal to sell us at 10 cents per gallon was that we would sell oil in other towns at a profit and at less prices than the Waters-Pierce Company was making at these other towns.

(The defendants objected to this testimony on the several grounds frequently herein repeated, to wit, irrelevancy, incompetency, in that it showed no offense against the laws of the State of Texas, and did not tend to prove any issue in the case. The court overruled the objection and admitted the testimony for the limited purposes of showing the methods of dealing on the part of the Waters-Pierce Oil Company, and the defendants excepted.)

160 The Waters Pierce Oil Company's agents did try to induce me not to sell oil bought from it to persons selling competitive oils. This occurred at Lone Oak, Hunt county, Texas, about March 1st, 1896. I agreed with Schenck & Simmons, W. F. Smith, J. H. Pierce & Co., and J. N. Dodd to exchange them 1,000 pounds of salt for fifty gallons of oil each, and they gave orders to

the draymen to take to J. S. Richards, agent of the Waters-Pierce Oil Company, for the barrel of oil from each one, and the dray delivered this oil to me, and in a few hours I went to the depot on business, and R. L. Simmons, of the firm of Schenck & Simmons, was in the office talking with Richards, and Richards told Simmons that he, Simmons, could not sell oil to Stillwell that way, and he, Richards, proposed to sell the oil that was sold in Lone Oak by the barrel.

(The defendants objected to this testimony as irrelevant and immaterial and not tending to prove any violation of law or any issue in the case. The court overruled the objection, and the defendants excepted.)

I have entered into an agreement with the Waters-Pierce Oil Company, through its agents, by the terms of which I was not to sell any competitive oil and was to deal exclusively with the Waters-Pierce Oil Company. A verbal agreement to this effect was made the latter part of July, 1896, between Stillwell Bros. and Taylor and Richards, agent for the Waters-Pierce Oil Company, by which Stillwell Bros. were to cease handling competitive oils in job lots and the Waters-Pierce Oil Company were to pay Stillwell Bros. $50 per month, said agreement to be canceled by either party on giving the opposite party a month's notice.

(The defendants objected to this testimony because the same was irrelevant and immaterial and did not show any violation of law or tend to prove any issue in the case. The court overruled the objection, and the defendants excepted.)

A. H. YARRINGTON testified for the State as follows:

My name is A. H. Yarrington; I live at Fair View park,
161 city of Austin, Texas; have been living there over twelve years. In 1890 I was engaged in the business of general merchandise and handled illuminating oils. I have had dealings with the Waters-Pierce Oil Company. In 1890 I bought some oil from an Ohio company. I do not know the name without looking on the books. After that I made an effort to buy oil from the Waters-Pierce Oil Company.

Here the State asked the witness the following question: "State whether they refused to sell it to you."

(The defendants objected on the ground that the time is located and fixed in 1890; that the law of 1889 was inoperative, inasmuch as it did not prescribe a penalty; further, that the law of 1889 had been repealed, and the saving clause in the repealing act did not justify this prosecution upon the transaction sought to be developed by the testimony of this witness. The defendants also moved the court to require the attorney general to elect under which statute—the statute of 1889 or that of 1895—he would proceed, urging that he could not proceed under both. The defendants also further objected to said question and the answer proposed to be elicited because there was an entire absence of any allegation in plaintiff's

petition as to the specific transaction sought to be developed by this witness. The court overruled the objection and permitted the witness to testify, and defendants excepted.)

I bought oil from some Ohio company, as I said before, and after that applied to the Waters-Pierce Oil Company to purchase more oil. The agent refused to let me have it unless I would sign a contract not to sell outside oil, but to buy strictly from them. This agent was A. B. Abadie. He was here a few weeks ago. At that time I was in business in Austin, Travis county, Texas. By outside oil I mean oil from outside concerns—that is, some other concern besides the Waters-Pierce Oil Company.

Cross-examined:

This occurred about the year 1890. I cannot be more
162 definite without going over my books. I am not sure whether it was in 1890 or 1889, but it was about 1890. I am satisfied it was in 1890. I quit business shortly after that. The conversation between me and the agent took place in my store, which was on the corner of Trinity and Pecan, or rather 6th street. W.
A. B. Abadie was the agent and local agent of the Waters-Pierce Oil Company at Austin. The way it came up was this: the Waters-Pierce Oil Company carried two grades of oil. They carried the Eupion oil as their high grade and a lower grade called the Brilliant. The oil I bought was the same as the Brilliant, and when I sent down to buy a barrel—as soon as a car is in town he knows it like a fire-bell ringing, and he went up to the store. He came up to the store and he saw the five barrels of oil I had bought, and he said if he had known there was a car in town they wouldn't sell to anybody that bought outside oils. He refused to fill my order for the Eupion oil. The Waters-Pierce Oil Company sold the Eupion oil as a fine grade of oil. It is a fine grade, the best grade of oil. I have bought oil like Brilliant oil. This is an inferior grade. I think it is a fact that the Waters-Pierce Oil Company had been advertising their Eupion oil for a number of years and taking a great deal of pains with it. I had two tanks, and would generally buy one barrel at a time and fill my tanks with Eupion oil. It is a fact that I would mix the high grade with the low grade. It is sorter like mixing water and whiskey. It is not a fact that I had a custom of mixing those oils; never in my life. I wanted a tank full of Eupion that day; a tank is about a barrel, containing about 50 gallons. I had five barrels on hand at the time, but this was a higher grade. I don't suppose I had sold all of the five barrels I had bought from competitive companies. I had no Brilliant oil on hand, but wanted some Eupion oil, and they declined to sell because I was handling outside oil; that was the only reason. I was not handling outside oils of lower grades. I didn't want to buy their low grades. I bought other grades to take the place of their low grades of oil.

163 Re-examined:

They never refused to sell me different grades of their oil before I dealt in other oils. They were not then afraid I would mix the oils. They never objected to selling me different grades—high grades. They never expressed to me any fear that I would mix their high grades and low grades of oil. I mean the Waters-Pierce Oil Company or their agents.

W. J. SCHENCK testified for the State by deposition, taken September 30th, 1896, as follows:

My name is W. J. Schenck; residence, Lone Oak, Hunt county, Texas; occupation up to September 21st, 1896, was grocer; firm of Schenck & Simmons. I have dealt in oil, but am not now dealing in oil; am not buying or selling. Waters-Pierce oil is sold in my town and has been sold here to my knowledge for four years. I know of oils having — brought to this town and sold in competition with the Waters-Pierce Oil Company since July 31st, 1889. The Waters-Pierce Oil Company have no storage tanks at Lone Oak. They have a warehouse there and the oil is stored in 50½-gallon oil barrels and was drayed to customers in these barrels, customers paying drayage and returning empty barrels to depot. I am not acquainted with the methods of preparing for shipment by the Waters-Pierce Oil Company of these packages of oil, nor do I know the names of any other oil companies who have tanks or warehouses in this community. I know of no oil being regularly sold in this town now in competition with the Waters Pierce Oil Company. I have never received any rebates from the Waters-Pierce Oil Company from the regular prices of oils purchased from them. I have not been approached by any one acting for the Waters-Pierce Oil Company and offered any inducements in the way of rebates or other blandishments to handle exclusively the Waters-Pierce Oil Company's oil. I have retailed other oils. I made money and continued to handle other oils as long as I got them. The
164 Waters-Pierce Oil Company did interfere in my sales of other oils. J. S. Richards, the local agent of the Waters-Pierce Oil Company, threatened to make us lose money if we handled the Stillwell oil, and said he would hire a man to retail oil here at five cents per gallon, if necessary, to break down the Stillwell oil. He refused to sell us more than one barrel at a time, and no more until that barrel was sold out.

(Defendants objected to this testimony because the same was irrelevant and incompetent on the several grounds frequently raised and hereinbefore stated to other testimony of a similar nature. The court overruled the objection, and the defendants excepted.)

About May 1st, 1896, the firm of Schenck & Simmons traded Stillwell Bros. 50½ gallons of oil for 1,000 pounds of salt. The drayman was told to deliver the oil to Stillwell Bros. J. S. Richards, local agent for the Waters-Pierce Oil Company, made a kick at this and said he would sell oil by the barrels in Lone Oak, and if we sold any more of Stillwell's that he couldn't sell us oil. The

Waters-Pierce Oil Company have a local agent here. His name is J. S. Richards. He is station agent for the M., K. & T. R'y Co. at Lone Oak, express agent and telegraph operator. There have been other agents here—Wagnong and Taylor. Taylor made Lone Oak pretty regularly before Stillwell Bros. brought in the competitive oil. I don't think the Waters-Pierce Oil Company had a local agent here until after that time. Stillwell Bros. introduced oil into Lone Oak at 10 cents per gallon for the same grade of oil that the Waters-Pierce Oil Company was selling for 14 cents per gallon. The Waters-Pierce Oil Company then put their oil down to 10 cents, where it staid until competition ceased, when it went up to 12 cents per gallon.

J. S. RICHARDS testified for the State by deposition, taken September 30th, 1896, as follows:

165 My name is J. S. Richards. I live at Lone Oak, Texas; am agent and operator for the M., K. & T. R'y Co. at Lone Oak; also agent for the American Express Company, and agent for the Waters-Pierce Oil Company. The Waters-Pierce Oil Company have a warehouse at Lone Oak, and the oil is stored in iron 50½-gallon barrels. Customers get them as they need them. At Lone Oak at one time during the competition I was instructed by Mr. Hathaway, agent of the Waters-Pierce Oil Company for the northern division of Texas, not to sell Stillwell Bros.' oil. Stillwell wanted a barrel of Waters-Pierce Company's oil to put in stock and show how inferior the Waters-Pierce Company's oil was in comparison with oil in his stock in order to injure the trade of the Waters-Pierce Oil Company and build up his own. Stillwell stated to me that he had plenty of oil of both kinds. The idea I got from his talk was that he wanted the oil to injure the Waters-Pierce Oil Company. The Waters-Pierce Oil Company have an agent at Lone Oak. His name is J. S. Richards. He is station agent and operator of the M., K. & T. R'y Co. at Lone Oak; also agent for the American Express Company. Wagnon and Taylor, agents of the Waters-Pierce Oil Company, have come to Lone Oak on various occasions and for different purposes. I am now agent for the Waters-Pierce Oil Company at Lone Oak. The oil is shipped to me from Greenville on orders sent to Hathaway at Denison, billed to Waters-Pierce Oil Company. It comes in barrels, some in 10 gallon packages, just as customers want it.

T. J. LOVELACE testified for the State by deposition, taken October 29th, 1896, as follows:

My name is T. J. Lovelace. I reside in Waco, McLennan county, Texas, and am engaged in the occupation of retail grocer. I have sold oil in Waco since 1886, and am now in that business as far as

166 it relates to the retail grocery trade. I am now buying oil from both the Waters-Pierce Oil Company and the Ohio oil works. The Waters-Pierce Oil Company is selling oil at Waco at this time, and has continuously sold oil here since I arrived in this city, about 10 years ago. Other oils have been brought here in competition and placed on the market for sale and sold in

competition with the Waters-Pierce Oil Company since July 31st, 1891, and the oils so brought here and placed in competition with the Waters-Pierce Oil Company was sent here by George Rice from the Ohio oil works. The Waters-Pierce Oil Company have storage tanks in this city and have had them here for at least ten years. I do not know the capacity of said tanks. They are very large. I do not know how said tanks are supplied with oil, as I have never seen them filled from the cars. The city trade is supplied by wagon tanks, which said wagon tanks are supplied from the large tanks just mentioned. The Waters-Pierce Oil Company has a warehouse also in this city, in which packages of oil containing 2 five-gallon cans and a case are stored and the goods are supplied the customers by the Waters-Pierce Oil Company's wagons. I am not acquainted with the met-ods of the Waters-Pierce Oil Company in preparing packages for shipment, and I do not know where these packages are put up, but I do know that they are not put up in this county. There was no other oil tanks in this city except the Waters-Pierce oil tanks prior to this year, but George Rice has an oil tank here now, which was placed here this year, 1896. There are oils being sold here besides the Waters-Pierce oil and this oil is from the Ohio oil works. Waco and Dallas are the only two towns in this State that I can state of my own knowledge have oil tanks belonging to the Waters-Pierce Oil Company. These two cities also have warehouses belonging to said company. I have never received any rebate from the Waters-Pierce Oil Company at any time, nor have I ever been approached by any one acting for the Waters-Pierce Oil Company. I have handled oil in competition with the Waters-Pierce Oil Company and with this result: In
167 1892 I bought oil shipped here by George Rice, and the Waters-Pierce Oil Company refused to sell me oil, and for four or five weeks the said company refused to sell me oil, and during that time I couldn't buy a gallon from them at any price. The Waters-Pierce Oil Company did interfere with my sale of other oils, and their interference consisted in this: I had bought Rice oil, and the Waters-Pierce Oil Company cut the price and sold at retail at less than I had bought wholesale, and after said Waters-Pierce Oil Company had reduced the price in this way they refused to sell me at the reduced rate. By thus running the retail price of the Waters-Pierce Oil Company down below what I could buy other oil at wholesale for, I was compelled to quit selling oil at all, because I couldn't afford to buy at wholesale and sell at retail for less than the wholesale price, and I couldn't buy the Waters-Pierce oil at reduced figure or cut rates, because I had bought oil from another company. In fact, they refused to sell me at any price unless I would agree to buy from no one else but them.

(The defendants objected to this testimony of the witness for the reasons already stated in numerous objections hitherto, to wit, irrelevancy, incompetency, no violation of law, &c. The court overruled the objection, and the defendants excepted.)

W. E. Hawkins was the agent of the Waters-Pierce Oil Company

at the time I speak of, at Waco. I do not know that the Waters-Pierce Oil Company has ever discriminated in prices against me or any one else in this city except the time when they positively refused to sell me for any price, and after they refused to sell me I didn't apply to them any more; but when the Rice oil left this market on account of the war in the oil trade and on account of the reduced price of oil, then the agent of the Waters-Pierce Oil Company, W. E. Hawkins, of this city, came to me and informed me that he would then furnish me oil. The Waters-Pierce Oil Company have an agent here now. His name is J. H. Littlefield, and he has no other business that I know of. The competitive
168 oil was offered on the market generally for less than the Waters-Pierce oil was then sold for at that time.

J. A. CROOKS testified for the State by deposition, taken December 1st, 1896, as follows:

My name is J. A. Crooks; my residence is Waco, McLennan county, Texas, and my business is that of a commission merchant. I sold oil for George Rice about three years prior to 1893, but I am not now in that business. Waters-Pierce oil is sold here in Waco now and has been since I came here, about nine years ago. George Rice and the Eagle Refining Company have sold oil here in competition with the Waters-Pierce Oil Company since that date. The Waters-Pierce Oil Company have large storage tanks here. I can't tell their capacity. The storage tanks are supplied from the tank cars and the trade is supplied from the wagon tanks, which wagons are filled from the storage tanks. The Waters-Pierce Oil Company also have a warehouse here. The packages consist of five-gallon cans in case made of wood. They also have large metallic barrels, which said barrels are filled here. I am not very well acquainted with their method of preparing for shipment. I know, however, that the metallic barrels are filled here, but I don't know about the can cases referred to. I don't know positively whether there are any other tanks here or not, but if there are they have just been put in. George Rice oil is being sold here in Waco now. I handled George Rice oil, and the result was that I had to quit business. I couldn't compete with the cut prices inaugurated by the Waters-Pierce Oil Company whenever I bought the Rice oil here and placed it on the market. The Waters-Pierce Oil Company's agent did interfere with my business very materially in several different instances by interfering with my customers in this way: When the agent of the Waters-Pierce Oil Company heard of my having sold to certain parties, he would go to them and threaten to cut
169 the price of oil so that they could not sell the oil bought from me, and that they would then refuse to sell them oil at the reduced rate, and thus prevail on my customers to countermand the orders given me, or if it was too late for this he would not buy from me any more. J. H. Littlefield is their agent here, and he has no other business that I know of. I have never been approached by the Waters-Pierce Oil Company's agents, never been offered rebates, and have never made any agreements with the Waters-Pierce Oil Company.

G. M. RAPHAEL testified for the State by deposition, taken March 1, 1897, as follows:

My name is G. M. Raphael; occupation, a merchant; residence, Brownsville, Texas. As a member of the firm of Bloomberg & Raphael I have dealt in general merchandise, including illuminating oil, since about the year 1877, having sold same both at wholesale and retail. I purchased oils at different dates and in different quantities from the Waters-Pierce Oil Company, as required by our trade. My firm signed a written contract with the Waters-Pierce Oil Company or their representative about the year 1881. I cannot attach copy of the contract, because I believe the signature was attached to the original only, which was retained by the agent.

(The defendants objected to the evidence of any contract made in 1881 with the witness, because at said date any contract, no matter how restrictive of trade, did not constitute any violation of the laws of Texas at that time and was perfectly legitimate, and it being legal and competent at said time, no act of the State could render it illegal thereafter. The court overruled the objection, and the defendants excepted.)

The substance of the contract, as near as I can recollect at present, was that they took our then stock of oil and oil warehouse situated near the railroad station at cost to us, paying us cash for same, we on our part agreeing to purchase all future requirements of
170 illuminating oil from their local agent at prices established by them, from which prices we were to receive a rebate of fifteen cents per box on making settlement at the end of each month, the Waters Pierce Oil Company on their part agreeing that the rebate of fifteen cents per box to be limited to the parties to the contract, who were jobbers and wholesalers, like my firm, and that the beneficiaries were to sell at the invoice price to retailers. My firm bought oil from the Waters-Pierce Oil Company agency in this town. I have no recollection of the company refusing to sell us oil or of the question of the price ever arising since the signing of the contract. Having signed a contract for the purchase of all our illuminating oils from the Waters-Pierce Oil Company, any failure to do so would have been considered a breach of contract. We bought no oils from any other person or company save from the Waters-Pierce Oil Company during the year 1896 or any other date. My firm was at no time guilty of a breach of contract, but some time during the year 1896 I was shown a letter from the Waters-Pierce Oil Company's Galveston office, addressed to Mr. W. B. Austin, their agent here, to notify all parties to the contract that whereas Miguel Fernandez, a merchant of this town, one of the signers of the contract, had withdrawn, that the contract was cancelled, and that prices would be the same to all and for all quantities; that the rebate was from that date discontinued, but they would continue to deliver us oil at whatever price any outside brand might be offered in this market. We have not tried or made any effort to purchase other oils than the Waters-Pierce Company's oils, nor am I aware of any recent contract having been signed by

my firm. My firm purchased no oil from S. P. Wreford, to the best of my recollection, some time during the year 1896, when other oils were offered at a lower price than that charged by the Waters-Pierce Oil Company. Their agent notified me that his company would protect us against loss on whatever stock we might have on hand, making the price the same as that offered by the sellers
171 of other oils. The understanding of the Waters-Pierce Oil Company was that we should at all times be in a position to hold our trade by being able to supply purchasers with their oil as cheaply as any other oils in the market competing with theirs. The protection was by reducing their prices to meet competition, from which prices during the continuance of the contract we were allowed a rebate of fifteen cents per box when settling with the agent at the end of each month. To the best of my recollection, on a number of occasions during the continuance of the contract the price of oil was lowered when competing oils was brought into this market. Subsequently the price was raised when the competition was ended.

M. H. Cross testified for the State by deposition, taken April 1st, 1896, as follows:

My name is M. H. Cross; I live in Matamoras, Mexico. As a member of the firm of J. S. & M. H. Cross, I have been dealing in illuminating oils for several years last past. I am a wholesale dealer, doing business in Brownsville, Texas, and Matamoras, Mexico. I have purchased illuminating oils of the Waters-Pierce Oil Company, the purchases being in lots of about five hundred boxes at a time, nearly all of which was for export. I did sign a contract. I have no copy. The Waters-Pierce Oil Company has the contract. As I can best remember now, the contract was that I was to buy all oils I bought from the company, and was to receive a rebate of fifteen cents per box. The contract was to be cancelled by giving the company ten days' notice in advance. By the terms of this contract I could not sell oil at less than the schedule invoice price of the company. The company never refused to sell me oil, but by the contract I became bound to buy from the company. I couldn't sell below a price fixed by the company. The minimum price at which oil could be sold was fixed by the company. The company has never refused to sell me oil, but when I bought
172 oil from other parties the contract with the company was suspended and the company would not give me the rebate. About two years ago I bought about one thousand boxes of oil from the Bear Creek Refining Company of Pennsylvania, represented by S. P. Wreford, its agent here. I continued in business transactions with the Waters-Pierce Oil Company after I made the above purchase. It was verbally understood by the company's agent that the old contract was to be continued. The company did not cancel its contract with me; I cancelled the contract and gave the company full notice before making the purchase. I continuously bought oil from the Waters-Pierce Oil Company without any trouble whatever. The Waters-Pierce Oil Company has not offered at any recent time to renew the contract with me. When I bought oil from Wreford

about two years ago the Waters-Pierce Oil Company did reduce the price of oil in this vicinity, but how much I do not know. The agreement with the company was that the company would protect us in prices against competitors. The protection was given by reducing prices of oils. The Waters-Pierce Oil Company reduced the price of oils sufficiently to meet competition. The price was raised sometimes, but I don't know whether it was because there was no competition or because the price of oil in New York market had increased. In selling oils we were always governed by the contract with the company.

MANUEL ALONZO testified for the State by deposition, taken April 1st, 1896, as follows:

My name is Manuel Alonzo; I am a merchant and I reside in Brownsville, Cameron county, Texas. I have dealt in illuminating oils for about twenty years as retail dealer. I bought about four hundred or five hundred boxes of oil annually. I had bought oil from the Waters-Pierce Oil Company; I bought in small lots every month. I had a contract with the company, which was in writing.

I have no copy that I know of in my possession; I may have
173 had a copy. If so, it has long since been lost or mislaid.

The contract was that I was to buy all the oil I bought from the company and was to receive a rebate of 15 cents per box on the common oil and a rebate of 20 cents a box on the better quality of oil. The company agreed to make a reduction in price of oil in case there was other oil on the market selling at a lower price than the company's price, and the contract could be cancelled by giving the company ten days' notice. I couldn't sell oil at a price less than the company's invoice price. The company fixed the minimum price at which oil could be sold, and the company never refused to sell me oil and never objected to my buying oils from any one else, because I never violated the contract. I have never bought any oil from any one except the Waters-Pierce Oil Company. The company has cancelled the contract, and I understood the agent of the company to say that the contract was cancelled because certain parties to the contract had entered into competition with the company. The agent of the company had approached me in regard to entering into a new contract. I don't remember what the conditions of the contract were to be.

(This evidence was objected to as irrelevant and incompetent. The objection was overruled, and the defendants excepted.)

The company agreed to give protection to those under the contract, and such protection was given by means of a rebate through the company's agent here. The company reduced the price of oil sufficiently to meet competition. I do not know whether the company raised the price or not.

J. H. FERNANDEZ testified for the State by deposition, taken April 1st, 1897, as follows:

My name is J. H. Fernandez. I am a merchant. My residence

is Brownsville, Texas. I have dealt in illuminating oils for about 14 years. I bought about 500 boxes of oil annually. I have purchased oil from the Waters-Pierce Oil Company at different
174 times and in different quantities. I have had a contract with the Waters-Pierce Oil Company. The contract was in writing, and I have no copy of it in my possession. The contract was delivered to the agent of the company. It was, as I best remember, that I was to buy all the oil bought by me from the Waters-Pierce Oil Company, and I received a rebate of 15 cents per box, or the invoice or schedule price, I having no authority to sell to any one at a price less than the invoice or schedule price. I could cancel the contract by giving the company ten days' notice. The price fixed was the lowest at which I could sell the oil—that is, the invoice price. The Waters-Pierce Oil Company never objected to my purchasing oils from any other person. About the end of last year I bought oil from the Emory Manufacturing Company, Bradford, Pennsylvania, through S. P. Wreford, the company's agent here. I have never had any transactions with the Waters-Pierce Oil Company or any of its agents after purchase from Wreford. The Waters-Pierce Oil Company cancelled the contract the day previous to my order from the Emory Manufacturing Company. No reasons were given by the company for so doing. Since then the company's agent here approached me and asked me to renew the contract with the company and I refused. I made no effort to purchase oil from the company since the date of the purchase from Wreford, December 24th, 1896. The company's agent, knowing that I purchased oil from the Emory Manufacturing Company, offered to buy the oil from me while it was on the way and before it reached here, and I refused to sell.

N. LOPEZ testified for the State by deposition, taken April 2nd, 1897, as follows:

My name is Nicholas Lopez; occupation, merchant, and my residence is Brownsville, Cameron county, Texas. I have been engaged in selling illuminating oils about 15 years. I buy about 200 boxes annually. Yes; I was under contract with the Waters-Pierce
175 Oil Company. I bought oil from the Waters-Pierce Oil Company at different times and in different quantities, and the contract with the company was in writing. I have neither the original nor a copy in my possession. The contract I signed was delivered — the agent of the Waters-Pierce Oil Company. I understood the contract was that the Waters-Pierce Oil Company should make me a rebate of 15 cents per box on all oil purchased by me from the company, and I could cancel the contract at any time by giving the company ten days' notice of my intention to do so. The understanding with the company was that I should sell no oil at a price less than the invoice price. The Waters-Pierce Oil Company has never refused to sell me oil, and during my dealings with the company it never objected to my buying oil from any one else, always provided I could give the required notice as per contract. Several years ago I bought some oil from an agent of the company

selling oil. I do not know who was the owner of the oil. I paid the agent for the oil. After this purchase I saw the agent of the Waters-Pierce Oil Company and asked to be included in the contract of the company. I thereupon signed the contract. The company notified me that the contract was cancelled and ended. No reasons for doing so were given by the company or its agents so far as I can recollect, and since the date of said notification I have bought oil from the company several times. The agent of the company asked me if I was willing to renew the contract. I understood that the contract was to be on the same basis of the old one which had been cancelled. I then told the agent that if all the parties to the old contract was willing to renew I was also willing, but if any one was not willing I would not sign the contract. The agent has not mentioned the matter to me since that time.

(The defendants objected to this portion of the testimony of the witness, because the same was irrelevant and incompetent, showing as it did merely an offer without acceptance, and therefore not pertaining to any issue in the case; but the court overruled the
176 objection, and the defendants excepted.)

The Waters-Pierce Oil Company has reduced its price on oil in the market here to meet competition on several occasions, and the rebates were made here by the agent of the company. I do not know whether the company's prices were lower than the prices of other oils.

MIGUEL FERNANDEZ testified for the State by deposition, taken April 2nd, 1897, as follows:

My name is Miguel Fernandez; occupation, merchant. I reside in Brownsville, Cameron county, Texas; have been in the illuminating-oil business for about 12 years, and purchased about $1,400 worth of oil annually. I have bought oil from the Waters-Pierce Oil Company, about two or three invoices monthly. The contract was in writing. I have no copy in my possession. The contract read, as I can best remember, that I became bound to the company to buy oil at a discount of 15 cents per box from invoice-cost price, and that I should buy all the oil I bought from the company. This contract was in force for about three years, and is not in force now. The contract was that I couldn't sell oil for a less price than the invoice cost, and if I did so I was liable to be fined $50, United States currency. The oil was invoiced, and at the end of each month the company made me a rebate of 15 cents per box. I could fix any price I wished in selling, the oil not being under the invoice price. The contract was that I could not buy oil from any other firm or persons while under the contract. In order to buy oil from other parties I had to give 10 days' notice to the company to cancel the contract; then I could buy from whom I wished. I have bought oil from other parties. I have had communication with the company's agent. On October 8th, 1896, I bought oil from the Emory Manufacturing Company, Bradford, Pa. I cancelled the contract with the

Waters-Pierce Oil Company because I could buy cheaper
177 from this other company, with more privileges. Before revoking the contract I proposed to the agent of the Waters-Pierce Oil Company that I would buy from him the oil, paying him five cents more per box than what I could buy it for from this other company, and he refused my proposition. The company's agent wanted 15 cents more per box than what I could buy it for. I therefore cancelled the contract with the Waters-Pierce Oil Company. After I bought oil from the Emory Manufacturing Company the agent of the Waters-Pierce Oil Company asked me to go into a contract again, and I refused, and he has made several propositions and attempts to get me to come into contract. I still refused.

(This portion of the testimony of the witness was objected to by the defendants on grounds, first, that it was immeterial and irrelevant; second, that it showed a mere negotiation between the parties without any consummation of an agreement; third, that it showed no violation of law. The court overruled the objections, and the defendants excepted.)

During the year 1896 I purchased of S. P. Wreford, agent of the Emory Manufacturing Company, 500 boxes of oil. I had some on hand. As soon as the oil I bought from Wreford reached this place, the Waters-Pierce Oil Company reduced its price on oil and continued to reduce the price fice cents per box for three or four successive times. A rebate was made when Mr. Wreford brought the first 500 boxes of oil. I don't recollect how much rebate was made on stock I had on hand at that time.

By agreement of counsel, the testimony of the following witnesses given by them on the trial of the case of The State of Texas *vs.* E. T. Hathaway, at Waco, in December, 1895, *were* read to the jury:

W. A. BRYAN testified for the State as follows:

178 My name is W. A. Bryan, and I reside at McGregor, in McLennan county; have lived there eight or nine years; engaged in the grocery business and have been dealing in illuminating oils; have purchased oils from the Waters-Pierce Oil Company; also have made purchases from competing parties at McGregor. I could not well locate the time, but I bought oil a few times from competing parties. I bought some oil from competing parties in October, 1895. I also bought some before November 21st, 1894. E. S. Woods was representing the Waters-Pierce Oil Company at McGregor, at that time. I don't remember definitely when I purchased competing oil in McGregor prior to November, 1894, but suppose it was eighteen months or two years; I don't know. Nothing occurred between Mr. Woods, the agent, and me prior to the first of October, 1895. One of these competing companies came in there and sold oil to various parties. This was about 1892 or 1893. This competing company came in there and sold oil to the other merchants at something less than I had been buying it, and also he sold it to me. I bought his oil and sold it for less than the other parties could sell it outside of those other merchants who got

it at the same price I did. Mr. Grice told me he would sell me this oil if I would sell it at a certain price, otherwise he didn't expect to let these people have oil that had bought from other parties. I understood this to be a condition that he would let me have the oil at that price if I would sell it at a figure dictated by him. I believe I sold it at 12, 13, and 14 cents. Before that we had been retailing it, I believe, at 25 cents a gallon, and about 16 and 18 was what we paid for it by the barrel. I don't know what the other merchants paid. Oil was worth in that market at that time between 16 and 18 cents for the Eupion brand. The price I fixed was between 13 and 14 cents. Mr. Grice gave no reasons for this. I was not to let any one except consumers have the oil. I was not an agent in any sense of the word. He sold oil to everybody there. I think
179 Mr. McIlvain bought oil at the same prices and maybe one or two others. I had no knowledge of any other merchants buying oil or being able to obtain it, but I think they did. The oil that had been shipped there was received and stored there and was finally sold. The prices that I had instructions to sell at did not remain for more than two or three weeks, and then oil began to gradually advance and assumed its original figures. I do not know that oil regained its former price for about three months—not exceeding three months.

W. F. HANNING testified for the State as follows:

I live at Lockhart, Texas; am engaged in the grocery business; have been engaged in that business since 1881. I was engaged in buying oil previous to November, 1894, and subsequent to 1891. I bought oil from the Waters-Pierce Oil Company in 1892 and from George D. Rice. The first oil that was shipped in there by a competing company was from Rice, through an agent in San Antonio. The next lot came in there was from Rice, through J. L. Lewis. E. M. Storey was the agent of the Waters-Pierce Oil Company there. Mr. Canning, another agent, came there. There was a car-load of Rocky Mountain oil ordered in there about that time, and Mr. McKean came there to me and wanted to get me to cut prices under whatever the Rocky Mountain was. This car of Rocky Mountain was ordered in there by J. S. Lewis. Then he cuts below me, and Mr. McKean came to me and made my retail prices and tacks them on the door. I agreed to sell by these retail prices he tacked up, and then he come to me and wants me to make another retail cut and let him tack up new prices, and I would not do it, and then he says to me, "Well," says he, "you are handling more oil than any one else in town." He told me: "I have went to Lewis and seen him, and I don't believe I can do anything with him, but it is just a matter of time until I do." He said it was just a matter of time until they were going to have that oil trade—something to
180 that effect—that he would freeze Lewis out. He made prices this way: He come to me and wanted me to make my prices lower, and I would not agree to it. I told him I thought oil was cheap enough. This occurred the latter part of 1892. I was selling Waters-Pierce oil at that time. To the best of my recollection the

transaction occurred this way: Mr. McKean came there and when he tacked up that sign Rice oil was selling for 14 cents, and he cuts it to 12 and makes my price on this board 15 cents, and he sells it to me for 12 cents. The second time he comes to me he tries to get me to cut lower, and I would not agree to it. We had a conversation about it. I had purchased oil from Mr. Canning before this sign was tacked up. I was handling oil from their agent. I agreed with him on the price I was to pay for it, which was 12 cents a gallon. When he came in he agreed to cut the oil to 15 cents. He said I was to keep on selling at 15 cents until he saw fit to change the prices. I had been selling at 20 when the sign was put up, and think this arrangement lasted six or eight months. I was to sell at retail best grade at 15 cents when Rice oil was being sold at 20.

H. SCHMIDT testified for the State as follows:

My name is H. Schmidt. I live at Bremond, Robertson county, Texas, and was in the general mercantile business. I know Mr. C. H. Fisher. The last time I had any transactions with him he was selling oil for the Eagle Refining Company. This was probably two years ago—say in 1893—about that time; I can't tell exactly. I didn't purchase any oil from Mr. Fisher. I have been buying oil from the Waters-Pierce Oil Company. I am not buying from them now (1895), because I am not in business now. I had a conversation with Mr. Fisher with reference to buying a car-load of oil that he had there at Bremond from Rice. This was about 1893. I don't know whether it was from Rice or the Eagle Refining Com-
181 pany. This oil was brought in there about 1893. I didn't buy any oil from Mr. Fisher. I bought some of the oil after the car came in there, but not from Mr. Fisher. I think I bought it from Mr. Clem, who was representing the Eagle Refining Company. After I had bought this Eagle Refining Company's oil I saw one of the agents of the Waters-Pierce Oil Company pretty soon afterwards. He called on me. It was either Mr. Hawkins or Mr. Grice, one of the two. Mr. Hawkins was then living at Waco. Mr. Grice, I think, was living at Dallas. This was about a week after the purchase of the Eagle Refining Company's oil. The agent of the Waters-Pierce Oil Company when he came remarked that it looked like they were left out on the oil business in Bremond, and that they were going to sell oil if they had to put up a house there. I think he left that day, and a few days afterwards one of the others came back and offered me oil at a little below the figure I had purchased it from the other concern. There was not any real contract made, but he told me he would sell me oil at 9 cents, but would want me to retail at 12 or 12½, I can't tell which now. I accepted the proposition and bought oil from him. He didn't give any reason for wanting to fix prices. There was no positive agreement. I agreed to sell the oil at 12 cents. I accepted his proposition and got the oil upon those terms.

J. W. THOMASON testified for the State as follows:

My name is J. W. Thomason. I reside at McGregor, and engaged in the business of grocer and produce and wagon yard. I have been engaged in that business six years, I think, prior to December, 1895. I have sold oil for six years. I got the oil from Waco about six years ago. The Waters-Pierce Oil Company was the only one I know of. When I first went to McGregor the Waters-Pierce Oil Company was the only one selling oil at that place. I don't remember how long after that competition companies came in. George Rice came in there about three years ago with his oil—that
182 is, about December, 1892. Zeb Pettigrew was the agent of the Waters-Pierce Oil Company at that time. He was railroad agent, too. I bought a car-load of oil from Rice. There was a car-load came in to me and Mr. Dickey, but I didn't get my part of it. The retail price of oil was put down to 13 and 14 cents—13, I believe it was, for Brilliant and 14 for Eupion. These prices were made by W. A. Bryan, I believe, for the Waters-Pierce Oil Company. I saw the sign displayed on his house. This fight lasted about two or three weeks. A man named Hawkins appeared on the scene about that time from Waco. I don't know his initials. He claimed to be the Waco agent of the Waters-Pierce Oil Company. The only conversation I had with him he said they were going to sell their oil there. Mr. E. S. Woods came to me also about that time. He wanted to see whether I had bought any oil from the other oil companies, and I agreed with him not to buy any from anybody else. This thing has been going on there for six years, I think. Some time last year Mr. Woods brought me a letter from the Waters-Pierce Oil Company's man at Temple. He said, "I came around to see if the old man had sold you any oil. If he sells one or two barrels here I am going to put up a fight." He came to me several times; came around and said he wanted to sell me oil, and said he got a little commission out of it. I have continued to buy competing oil here lately. At that time I quit. The reason I quit was that they would sell the Waters-Pierce oil so cheap, and then I had agreed with Mr. Woods to stop the other oil. He told me he would not sell me Waters-Pierce oil if I continued to buy from other concerns. He told me several times he would not sell me oil if I did not let that other oil alone; that the Waters-Pierce Oil Company would not sell me oil unless I quit buying from other parties. That is what Mr. Woods said.

(Defendants objected to that portion of this witness' testimony which stated that the price of Waters Pierce oil when competing oil entered the market was 14 cents and it came down, because
183 the same was irrelevant and incompetent. The court overruled the objection, and defendants excepted.)

HERMANN VOSS testified for the State as follows:

I live at Gatesville, Texas; am engaged in the business of general merchandise, drugs, and groceries. Prior to the 21st day of November, 1894, I was a dealer in petroleum oil. We purchased oil principally from the Waters-Pierce Oil Company. We purchased oil from George Rice also in the latter part of 1892 and some time in

1893. In the fall of 1893 an agent of the Waters-Pierce Oil Company came from Dallas. I don't remember his name. At that time I was figuring on buying another car of Rice oil, and the local agent of the company brought this gentleman to me. I don't know whether the local agent remained while I had my dealings with him, but this gentleman said to me that they didn't want me to buy any of this other oil, and if I would agree not to buy this other oil he would lower his price to me if I would agree not to buy the other oil. I agreed with him on a price for Waters-Pierce oil, and I made an agreement with him then not to buy the other oil. The prices I agreed on was 11½ cents for the 150 test, and the other, I think, was 16 cents, or about 16 cents, for the Eupion. He offered to sell me the oil with the understanding that I was not to buy oil from anybody else. I was then contemplating buying another car. I don't know whether he knew this or not. I think I had told the local agent. I think he knew. The Dallas agent appeared there a few days after I told the local agent. I do not know at whose solicitation he came. Mr. Reese came there and told me he was there.

The State offered a portion of the deposition of JOHN P. GRUET, of St. Louis, Missouri, as follows:

My name is John P. Gruet. I am 47 years of age. My
184 address is Webster Grove, St. Louis Co., Mo. I am secretary of the Waters-Pierce Oil Company, and have been since February, 1892. The business they are engaged in is the manufacturing and merchandising of oils, axle grease, turpentine, rosin, &c., since May, 1878. The capital stock is $400,000. All the stock authorized by the charter of the Waters-Pierce Oil Company has been issued. I decline to state how much of the Waters-Pierce Oil Company stock I own or how long I have owned such stock. The stockholders of the Waters-Pierce Oil Company are Standard Oil Company of New Jersey, H. C. Pierce, Andrew M. Finlay, C. M. Adams, H. M. Tilford, and J. P. Gruet. I decline to give the amount of stock owned by each stockholder because I do not consider it my right to divulge the affairs of the other stockholders. The Standard Oil Company of New Jersey does own some stock. I decline to answer as to how much it owns because I do not consider it my right to divulge the affairs of the other stockholders. I decline to examine the books of the Waters-Pierce Oil Company and give the names of those who held stock in the company in March, 1882, and the amount of stock held by each, because I do not consider it my right to divulge the affairs of the other stockholders. I decline to examine the list of the names submitted me as contained in the purported Standard Oil trust agreement of 1882 and to state whether or not any one of them owned any stock in the Waters-Pierce Oil Company in 1882 or at any subsequent time, or how much each of them owned, because I do not think it my right to divulge the affairs of the other stockholders.

The State also read a portion of the deposition of H. C. PIERCE, taken at the instance and on behalf of the State, as follows:

My name is H. C. Pierce. I am 47 years old, and reside at St. Louis, Mo. I am president of the Waters-Pierce Oil Company; have been president of the Waters-Pierce Oil Company since the year
185 1889. Its business is refining, transporting, manufacturing, and merchandising petroleum and other oils and their products; also naval stores, axle grease, &c., since May 1st, 1878. The capital stock is $400,000, all of which has been issued. I decline to testify how much of the stock of the Waters-Pierce Oil Company I own or how long I have owned the stock, because I deem it unnecessary for the purpose of this case and it would be making public my private affairs. The present stockholders of the company are H. C. Pierce, Andrew M. Finlay, C. M. Adams, J. P. Gruet, H. M. Tilford, and the Standard Oil Company of New Jersey. I decline to testify as to the amount of stock owned by each stockholder, because the statement would be incompetent and it is not proper I should disclose the interests of others in this company. The Standard Oil Company of New Jersey owns stock in the Waters-Pierce Oil Company. I decline to answer as to the quantity of stock owned by the Standard Oil Company of New Jersey, because the statement would be incompetent and it is not proper that I should disclose the interests of others in this company. W. H. Waters, H. C. Pierce; Chess, Carley & Co.; H. A. Hutchins, W. P. Thompson, Geo. H. Vilas, M. R. Keith, Geo. F. Chester, were the stockholders of the Waters-Pierce Oil Company in 1882. I decline to testify as to the amount of stock held by each, because the statement would be incompetent and it is not proper that I should disclose the interests of others in this company. I have examined the attached list of names which appear in the Standard Oil trust agreement of 1882, but decline to answer whether any one or more of them owned any stock in the Waters-Pierce Oil Company in 1882 or at any subsequent time, because I deem it unnecessary for the purposes of this case and it would be making public the private affairs of myself and others.

I. LIEBRECH testified for the State by deposition, taken September 29th, 1896, as follows:

186 My name is I. Liebrech; my residence is Tyler, Smith county, Texas; my occupation is that of a merchant. I have dealt in oil; am now dealing in it; purchase oil from the Waters-Pierce Oil Company; the Waters-Pierce Oil Company sells oil here now. I know of oil being brought here to Tyler and sold in competition to the Waters-Pierce Oil Company since July 31st, 1889. There were changes in the price of Waters-Pierce oil here after the introduction of competitive oil. The prices declined; how much I don't remember. I can't tell how long the decline continued. I don't remember, it has been so long ago. I don't remember the prices of either of the oils before or after the decline. The competitive oils continued to be sold here for a while only. I do not know what became of them, nor exactly when they ceased to be sold. The

Waters-Pierce Oil Company has storage tanks at this place, but I do not know their capacity nor how long they have been here, nor do I remember how they are supplied with oil or how the oil is drawn from the tanks. For the retail trade the oil is brought to my store in tank wagons. They have a warehouse here in which they store oil in packages. They come in cases of two, five-gallon cans in one case, and another case of 12 or 24, I forget which, one-gallon cans in the case. I am not acquainted with the met-od of shipping these packages. No other companies have tanks in this vicinity that I know of, except the Waters-Pierce oil. I don't know whether any oil is being sold in any town in Texas in competition with the Waters-Pierce oil or not, nor do I know of my own knowledge of any other tanks or warehouses of the Waters-Pierce Oil Company in Texas. I never received any rebates from the Waters-Pierce Oil Company, nor was I ever approached by any one acting for the Waters-Pierce Oil Company making offers of rebates.
187 I have handled other oils in competition with the Waters-Pierce Oil Company in case goods. The Waters-Pierce Oil Company sold their goods here to other parties for 4 cents a gallon less than they would sell to me for the reason that I was selling competitive oils.

(Defendants objected to this part of the testimony of the witness, because same was irrelevant and incompetent and constituted no violation of the trust laws of the State; but the court overruled the objection, and defendants excepted.)

J. J. GOODMAN testified for the State by deposition, taken September 29th, 1896, as follows:

My name is John J. Goodman. I reside in Tyler, Texas. My occupation is that of a grocery merchant. I have been and am now dealing in oil and buy Waters Pierce Oil Company's oil. The Waters-Pierce Oil Company is selling oils here and has been for years. I can't say just how long. I know of other oils having been brought here in competition with the Waters-Pierce Oil Company since July 31st, 1889. The Waters-Pierce Oil Company have tanks here. They have been here several years, but I don't know their capacity, nor do I know by what process the tanks are filled, nor how the oil is drawn to supply the trade. They also have a warehouse here for storing oil in cases. The case consists of two five-gallon cans. They sell a person whatever they want and deliver it around town by free delivery. I am not acquainted with the method of preparing these packages for shipment. There are no other companies that have tanks or warehouses in this community. There is no other oil sold here now in competition with the Waters-Pierce Oil Company, nor do I know of any oil being sold in any place in Texas in competition with the Waters-Pierce Oil Company. I have never received any rebates from the Waters-Pierce Oil Company unless it was on the difference in price according to quantity purchased. In one case I did receive a rebate
188 on some oil they had sold me. They gave me a rebate after the sale was made to me. This was since July 1st, 1889. It

was two or three cents a gallon. I don't remember now which. On one occasion referred to above, the Waters-Pierce Oil Company charged me two or three cents a gallon for oil, and they at the same time charged their other regular customers here. When I learned this I went to their general manager at Marshall and told him that it was a mistake; they then gave me the rebate, making the price I paid the same as paid by their other customers. I was never at any time approached by any one acting for the Waters-Pierce Oil Company who offered inducements to me to handle exclusively their oils. I have never handled other oils in competition with the Waters-Pierce Oil Company, and have never dealt in any other oils. The Waters-Pierce Oil Company never refused to sell me oil, nor did any of its agents. They never tried to induce me nor any one else that I know of not to sell oils bought from it to persons handling competitive oils. There was only one time that the Waters-Pierce Oil Company refused to sell me oil as cheap as to others, and that was the occasion referred to above.

Here the State rested.

Defendants offered in evidence the proceedings on the dissolution of the Standard Oil trust held in New York city March 21st, 1892, as follows:

Dissolution of Standard Oil Trust.

Proceedings of meetings held at 26 Broadway, New York city, March 21, 1892.

The following notice of the time, place, and purpose of the meeting was mailed to all holders of trust certificates and published in a newspaper in every State in which a Standard Oil Company exists ten days before the meeting:

189 *Notice.*

A special meeting of the holders of Standard Oil trust certificates will be held in the office of the trust, No. 26 Broadway, in the city of New York, on Monday, March 21, 1892, at 11 o'clock a. m., for the purpose of voting upon a resolution to terminate the trust agreement, in accordance with the terms of said agreement, and to take such further action as may be thereby rendered necessary.

H. M. FLAGLER, *Secretary.*

The meeting was called to order at 11 a. m.; John D. Rockefeller was chosen as chairman and John D. Archbold, secretary.

After the secretary had read the call for the meeting, S. C. T. Dodd offered the following resolution, which was seconded by Alexander E. Orr:

"Resolved, That the agreement dated January 2, A. D. 1882, commonly known as the Standard Oil trust agreement, and the supplement thereto dated January 4th, 1882, be, and are hereby, terminated this 21st day of March, A. D. 1892; and further—

"Resolved, That the affairs of the trust shall be wound up by John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbold, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, and O. B. Jennings, and the survivors or survivor of them, in the following manner:

"All property held by said trust, except stocks of corporations, shall be sold by said trustees at private sale and the proceeds thereof, together with any money belonging to the trust, shall be distributed to the owners of trust certificates according to their respective interests.

"All stocks of corporations held by said trustees shall be distributed to the owners of trust certificates in proportion to the respective equitable interests of said owners in the stocks so held in
190 trust as evidenced by said trust certificates—that is to say, each owner of trust certificate or certificates shall be entitled to deliver said certificate or certificates for cancellation and to receive in lieu thereof an assignment of as many shares or fractions of shares in each of the corporations whose stocks are held in the said trust as he is entitled to by virtue of said certificate or certificates—it being the intent and meaning of this resolution that the equitable interest in said stocks represented by trust certificates may thus on demand be converted into legal interests represented by assignments and transfers of said stocks by said trustees to the parties entitled thereto, which transfers and assignments may be entered on the books of the several corporations upon the demand of the holders of said assignments, thereby merging or converting equitable ownership into legal ownership in said stocks. All purchases, sales, exchanges, and cancellation of stocks or agreements therefor, executed or executory, made by the trustees during the existence of the trust, and all assents by said trustees as stockholders to purchases, sales, and exchanges of corporate property and to the formation and winding up of corporations and all other acts of the said trustees during the existence of the trust are hereby ratified and confirmed.

"Resolved, That the trustees hereby appointed to wind up the trust have power to act by a majority of their number to fill any vacancies in their number and to sign all papers by one or more of their number as attorney or attorneys in fact, and that they report from time to time to the parties interested all transactions had or done by virtue of these resolutions.

"Resolved, That the power to vote upon any stocks then standing in the name of the trustees shall cease at the end of four months from this date.

"Resolved, That personal notice of the adoption of these resolutions be given to all holders of trust certificates."

Mr. Dodd spoke in favor of the resolution as follows:

* * * * * * *

191 The voting on the resolution was by ballot and the tellers announced the vote as follows:

For the resolution, 808,504 shares.

Against the resolution, no shares.

Whereupon John D. Rockefeller, chairman, announced that more than two-thirds of the stockholders in value having voted in favor of the resolution, it was adopted, and the agreement constituting the Standard Oil trust was terminated.

A motion to adjourn was then made and carried:

JOHN D. ROCKEFELLER, *Chairman.*

J. D. ARCHBOLD, *Secretary.*

H. HARDY testified for the defendants in person as follows:

I reside in San Marcos; have lived there about 13 years; am a merchant and have dealt with the Waters-Pierce Oil Company. I cannot tell exactly how long. I think since I have been in San Marcos, quite a number of years. I am also mayor of the city of San Marcos. I was engaged in the grocery business and sale of oils while Mr. Dugger was acting as agent of the Waters-Pierce Oil Company. I don't think Mr. Dugger was the agent. I think his father-in-law was the agent and Mr. Dugger did the active work for the company. I believe his father-in-law was the real agent, but Mr. Dugger attended to the business. I bought oil of Dugger while he was attending to the business of the Waters-Pierce Oil Company. I have never had any understanding or agreement with him as to what we should sell oils at. I never had an agreement with Mr. Dugger during the whole time of his career there with the Waters-Pierce Oil Company with reference to what prices I should charge consumers. I always sold my oils at what I considered a legitimate profit. He never dictated to me the prices at which I should sell my oils.

192 Cross-examined:

My name is H. Hardy. I don't remember whether I bought, in connection with others, a car of oil in 1889 or 1890. I bought competitive oil on several occasions, but I don't remember the date. I bought once or twice. I never bind myself to any particular oil. I never bought a car-load. It was usually bought by a number of merchants. It is, however, brought in by the car-load and distributed to the different merchants. I deal in outside oils occasionally, gasolene. I don't deal in outside illuminating oils; not recently. I have not bought any illuminating oils except from the Waters-Pierce Oil Company for quite a while. It may have been in the last 12 or 18 months that I bought other oils, but I am not positive. I know that during the last 12 or 18 months my trade has been almost exclusively with the Waters-Pierce Oil Company. I don't remember any agreement with Lewis Fries or any other agent of the Waters-Pierce Oil Company in 1895 that they would sell me oil at 8 cents, in consideration that I would sell Brilliant oil at 65 cents for five gallons. I remember this agreement, that they would always protect me in prices. I don't think they stipulated. The way they would protect me in prices was that if parties cut lower they

would cut to meet it. They would sell oil to me as cheap as my competitors. If somebody had bought competing oil there and it was being sold below the price at which I could sell the oil I bought from the Waters-Pierce Oil Company at a profit, I would have put my oil down to meet the competition. The Waters-Pierce Oil Company would simply protect me in the prices on oil—that is, if others cut oil down they would protect me in the oil; they would protect the prices. I was not to buy exclusively from them in order to be protected. I had the liberty to buy from others if I saw fit, yet they would protect me in prices. I don't mean to say that they would protect me in prices, although I was selling competitive oil. I am not talking about competitive oil. There was no agreement that I
193 should buy exclusively from them. No agreement of that sort that I should not buy competitive oil. The fact that they would not give me protection if I handled competitive oil would follow as a natural conclusion, and that is the way I understood the agreement; that if I handled competitive oil they would not protect me against competitors, but there was no agreement that I should not buy competitive oils. Certainly they would not protect me if I did. In 1895 Mr. Fries, agent of the Waters-Pierce Oil Company, came to our town and offered the Brilliant oil at 8 cents a gallon on condition that we sell at 65 cents for five gallons and Water White 85 cents for five gallons. There was a sign put up to that effect. We got this sign from the Waters-Pierce Oil Company. They sent the sign containing the price-list at which we should sell oil. We received those signs and put them up there on the door. I don't remember what they stated.

In reply to question by the State's counsel, if these signs didn't state that the witness would sell oil at figures named, 65 cents for a certain grade and 85 cents for a certain grade, witness answered: "That is true, but I don't remember what the figures were." We don't sell oil for that price all the time. We put the signs up just like we put up a great many signs; they are to attract trade. I would sell oil for those prices spot cash. Any man could get oil at the prices named, 65 and 85 cents, if he paid spot cash. I don't remember the figures that were on the sign. Prices were named to us by the Waters-Pierce Oil Company's agent at San Antonio.

Counsel for the State put the following question to the witness: "Now, Mr. Hardy, what induced you to make that agreement with them which resulted in their sending you these signs?" Counsel for defendants objected because it was not a matter of inducement. Overruled by the court and exception taken by the defendants, and the witness answered as follows: "There was no agreements made about the signs at all. That part of the business, however, was attended to by a younger member of the firm,
194 either my son or a young man in the store there who buys all the oil." My son is not here. The young man I have in the store is not here. I didn't know anything about the signs until they came; but we acted on the signs when they did come. They staid up on the door two or three weeks. I had bought my stock of oil at the time these signs were sent us. I don't remember at what

prices. The price of Brilliant oil at that time was from 12½ to 13 cents a gallon, and we were to sell it for 65 cents for five gallons. At these prices we certainly did not make any profit, but the Waters-Pierce Oil Company were not to give us a rebate so as to allow us a profit. We got no rebate on that we had on hand at the time the signs were put up there. We had been paying about 12½ cents or 13 cents a gallon for Brilliant oil, and then we bought the oil at 8 cents. I don't remember who bought the oil. I think the conversation took place between the agent and the young man who buys the oil. This young man is not here. My recollection of the price now is that it was 65 or 85 cents, though I am not positive about that. The signs were nailed up by some one around the store; they were put up with my knowledge and consent. There were no other signs that were sent there but this one, and that was furnished by the Waters-Pierce Oil Company.

Redirect examination:

I don't think Mr. Dugger, while he was acting for the Waters-Pierce Oil Company at San Marcos, ever got me to cancel an order for competitive oil. I don't remember anything of that sort.

Recross-examination:

Mr. Dugger may have had some communication with other members of my firm. I wouldn't undertake to say that he did not. None passed between me and him personally.

Redirect examination:

Mr. Dugger never paid me $5.00 for cancelling an order; never paid me a cent.

195 Recross-examination:

There were two members of our firm—that is, in 1895 there was two—myself and son. We had a clerk, to whom we entrusted the buying of oils or anything else, and I do not know of my own knowledge what transactions he may have had with Mr. Dugger in reference to that or any other matter. I was mayor of the town at that time, but hadn't a great deal of outside business. I would stay about the store a great deal all the time; I staid there pretty closely.

W. E. HAWKINS testified in person for defendants as follows:

My name is W. E. Hawkins, and I reside at Ft. Worth, Texas. I resided at Waco before I removed to Ft. Worth, Texas. I am in the employ of the Waters-Pierce Oil Company. I was employed first at Dallas, twelve years and a half ago, in the capacity of clerk. I was first employed at Waco in 1885 as agent and remained there nine years. I sold oil in Bremond, Robertson county, Texas. I know Mr. H. Schmidt. I cannot specify what years I sold him oils. I sold him a great deal of oils. I never entered into any agreement or understanding with him regarding the price at which he was to sell oils purchased from the Waters-Pierce Oil Company. I don't

remember the time when the Eagle Refining Company made any sales of oil at Bremond, but I know they did sell. I had a conversation with Mr. Schmidt in regard to sales by the Eagle Refining Company. I never had any conversation with Mr. H. Schmidt such as he has testified about. I told Mr. Schmidt that as to the warehouse that if they desired that accommodation and convenience I would recommend to the company the establishment of a warehouse there for the carrying of oil. I had no conversation with him about selling oil at 12 cents. I never sold him oil at 9 cents upon the condition that he would retail the same at 12 or 12½ cents.

Cross-examination:

I am not positive what year I went to Waco. I went there
196 as local agent; had no special territory; didn't sell oil wherever I could, but if a man in the Indian Territory wanted oil we sold it to him. We sold wherever it was convenient and on such terms as we could agree upon. I had no exclusive territory. I could tell you to what points I shipped oil. I shipped to Bremond. We shipped out over six railroads from Waco, sometimes to Hillsboro, on the M., K. & T., as far as Itasca, which is 45 miles from Waco; didn't ship to Grandview, but stopped at Itasca; didn't ship to Italy, in Ellis county, nor to any points on the Santa Fe, because the Santa Fe didn't run to Waco. Sometimes we would ship oil to Crawford and Valley Mills, but the merchants did their own freighting there. We had customers at those points. I did not visit Hillsboro, Crawford, Valley Mills, and Itasca, so I was not familiar with the trade there. We had quite a large business, considering the size of the towns. We had some business in Moody, in McLennan county. We did not go as far south as Temple, on the M., K. & T., as there was another man at Temple and there was a warehouse there. We shipped to about four towns south on the M., K. & T., and sold considerable oil at those places—most of the oil they used there. We didn't ship up the Texas Central as far as Albany; only went to Whitney, in Hill county, and Morgan; also to Walnut Springs; shipped some there; didn't go above Italy nor to Hicao, on the Central. It is about 75 miles from Waco to Walnut Springs; it is at least 60 miles. We ran down also on the Waco & Northwestern; didn't touch any points on the International. We sold to the points between Waco and Bremond, including Marlin; also on the San Antonio & Aransas Pass as far south as Rosebud, which is about 40 miles; didn't sell any in Cameron; also shipped out on the Cotton Belt to Gatesville, about 45 miles west, and to Dawson, on the east, in Navarro county, which is about forty miles; had a great many different transactions at Dawson. I don't remember all the conversations had with men about business in the various circumstances. I happen to remember the conversation with Schmidt, because he had peculiar characteristics. He was a
197 large dealer and we had large dealings with him; another thing, he was there a long time, and we don't forget people like that. I didn't have as many transactions with him as with other men; didn't see him a great deal. He would come to Waco

sometimes; didn't have a great many conversations with him. I thought he was a pretty good man—that is, a business man. I am indicted in the district court of McLennan county under the anti-trust act. I do not know how many railroads go to Greenville. I have not been to Greenville. There are several in Waco. I don't know whether people in St. Louis can ship to Waco and to Texas points as cheaply as the Waters-Pierce Oil Company or not. I don't figure on that business. The business men in St. Louis make their own contracts. I am familiar with the local sales prices of oils in Texas—that is, in the territory in which I have been. I do not know at what price oil is sold to the jobbers in Texas. I sell to jobbers—that is, in my territory, but not in all Texas. I only sell to jobbers in Ft. Worth; Ft. Worth is a railroad center. I lived in Dallas a good time, but it was years ago. I don't know of my own personal knowledge that the railroad facilities in Dallas are equal to those in Ft. Worth. Living in Ft. Worth, I naturally think that Ft. Worth has better advantages. I know that the M., K. & T. runs from Ft. Worth to St. Louis, and that the other branch goes from Dallas to St. Louis. I know the Houston & Texas Central makes connection at Denison and goes south from Dallas; the Santa Fe goes southwest from Dallas; the Houston & Texas Central goes through Waxahachie; it runs from Ft. Worth on a branch. When in Waco, as local agent, I sold to jobbers—all Waco jobbers. I never had a jobber in Bowie to ask me to sell him at Ft. Worth. If I had I would have sold him. I simply manage my own town. I don't go outside and solicit business. I am local agent at Ft. Worth; am not district manager—never was. I have been in the oil business about 12½ years. I can't tell the jury whether the process of oil in all towns in Texas were the same as sold by the Waters-Pierce Oil Company.

198 WILLIAM GRICE testified for defendants as follows:

My name is Grice. I reside at Dallas, and resided there since 1879; am manager for the Waters-Pierce Oil Company, with headquarters at Dallas; have been since 1888 such manager. I could not name the counties in my division; Robertson county is in the division in which Bremond is located; McLennan county is in my division and was in 1895. I know Mr. H. Schmidt, of Bremond. I visited Bremond in 1893 and had a conversation with Schmidt; the conversation testified to by Mr. Schmidt did not take place. I had no such transaction with Schmidt at the time he named or at any time. I made no contract with Schmidt to sell him oil at 9 cents, but would want him to retail at 12 or 12½ cents. I know Mr. W. A. Bryan, of McGregor, Texas, McLennan county; knew him in 1893, and met him that year. I think the Waters-Pierce Oil Company made sales of oil to Mr. Bryan during that year. I didn't tell Mr. Bryan that I would sell him oil if he would sell it at a certain price, nor that as a condition that I would let him have it at that price he would sell it at a figure dictated by me. I didn't tell Mr. Bryan that in 1893 or at any other time. I never made any contract or agreement or had any understanding with him rel-

ative to the price at which he was to sell oil sold to him by the Waters-Pierce Oil Company. I didn't agree to let Mr. Bryan have oil at 11 and 12 cents provided he would sell for 13 and 14 cents; no such conversation occurred between us. I was appointed division manager in March, 1888. The defendants thereupon asked the witness this question: "During that time you have been division manager at Dallas, state whether or not you had any authority from any officer of the Waters-Pierce Oil Company to sell oils to any person in Texas on condition that he would resell at a fixed price; state whether or not you had any authority to enter into any agreement or understanding with any parties upon those terms or involving those terms." The State, by counsel,
199 objected to the question because the defendants could not show the negative authority of the witness in that fashion.

Counsel for the State stated that they had undertaken in this case to take the depositions of Mr. Pierce, the president of the company, and he had notified us in every manner that he didn't want to answer. This witness cannot state what his authority was because it is a negative way of stating his authority when the authority comes in writing from the company. Besides that, this is not the way to prove the want of authority. Let him produce his papers.

In answer to a question by counsel for the State, the witness stated that a great many of the papers and correspondence had been burned up in the fire.

The court sustained the objection, holding that it was not for the witness to say what his authority was under any written documents, and the defendants excepted to the ruling of the court.

The witness, having stated that the original letter appointing him manager was burned, testified that its contents *was* as follows: It simply placed me in charge of the division at a certain salary per month. There were no other instructions. I cannot state the contents of any of the other letters that were destroyed relating to my duties as manager. I don't recall that they stated anything as to my authority.

Counsel for State stated to the court that no objections were made to the introduction of oral instructions or of the contents of instructions in writing that were lost or destroyed, and the court so ruled.

Thereupon counsel for the defendants asked the witness this question: "State whether or not, Mr. Grice, you ever received any letter or order from any officer of the Waters-Pierce Oil Company authorizing or directing you to enter into any agreement or understanding with customers of the company regarding prices at which they should sell oil purchased by them from the company."

Counsel for the State objected to this question, and the
200 court said: "I will permit defendants to show what his powers were as agent—that is, if it was in writing, to show what the writings were, to produce the writings to show that the writings he received were all he received on the question of his powers as agent; you can show it in a negative way. I will permit

you to show what instructions that have been destroyed were, not what they were not."

The witness was not permitted to answer the questions, and the defendants excepted to the ruling of the court. The Waters-Pierce Oil Company have about 4,000 customers, merchants, in my division.

The witness, however, was permitted to testify, and did testify, that he never received any particular instructions as to his duties. The local agents in conducting the business of the company were under my instructions. The instructions were never put in writing; we simply told them. I did not always appoint them personally, but sent some one along. My district extended from El Paso to Saline, a distance of 670 miles east and west, and in some instances 175 miles south.

LEWIS FRIES testified for the defendants in person as follows:

My name is Lewis Fries; I reside at San Antonio, and have lived in Texas about 45 years, residing at San Antonio off and on for all that time. I am in the employ of the Waters-Pierce Oil Company now in the capacity as manager for the Western division of Texas, with headquarters at San Antonio; have been occupying a position with the company about a year and a half. Previous to that time was assistant manager for about a year at San Antonio. Prior to that I was local agent at San Antonio for about three years, I believe, and at Laredo 4½ years, making ten years in all I have served the company. I have been in the company's employ at San Antonio five years in August, this year; before that was in Laredo.

201 Before my division was created it belonged to the Southwestern division of Texas, with headquarters at Galveston, of which Arthur M. Finlay was manager. I was subordinate to him until appointed manager and am still. I do not know of any oils being shipped from my division into Brownsville, Texas. I know Mr. Dugger, of San Marcos. I know Mr. Hardy, who testified yesterday on this trial. I remember a conversation with Mr. Hardy in regard to placing a sign on his store at San Marcos, which was testified to by him on yesterday. That conversation was with Mr. Hardy in person. The conversation came up this way: I had made Mr. Hardy a low price on oil—indeed, the whole city of San Marcos—but they did not agree to handle it; they were handling other oils. I made Hardy and all dealers in San Marcos a lower price on oil than they had been getting, and Hardy said, I am going to make a leader of oil and put a sign on my door, or the front of my store, and advertise the oil at 65 cents for 5 gallons, or 85 cents, and I think he told me, "You are a better hand at it than I am; make a sign for me." I replied, "I have not got time to make it, but will send one from San Antonio," and I sent him a sign from San Antonio, but I never saw it on his door. Nothing else was said about the sign. There was no conditions attached at all for these sales, because when I made Hardy the price on oil he said, "I want you to understand that I am not going to bind myself to you or anybody else. Your price is lower than the other

an's, and I will buy from you. If he cuts under you, I am going buy from the other man." I told him that did not concern me. here was no contract or conditions named between us as to the ice named in the sign.

(Here printed circular of date December 31st, 1895, issued from e office of the Waters-Pierce Oil Company at St. Louis, was shown tness, and witness was asked whether he had received the letter, d, if so, when and how; to which he replied:) "I received this tter by mail with a package of circular letters. Circular letters came in the same mail. I received in January 2nd, 1896.

2 This is the copy I received, referring to the circular. I received this circular; that is one of the letters to which the rcular refers. I received a package of about fifty, I suppose, all at ce, but prior to receiving this package, some time in December, 95, I received one of the same form before I received the package. received a single circular letter. There was no difference in these ty circulars; they were all alike; they were all printed circulars, e the one shown me. I distributed them, one to each agent in y division, one or two of them."

Defendants offered the letter and circular in evidence, in connec-on with the testimony of the witness, as follows, to wit:

Waters-Pierce Oil Company.

ST. LOUIS, *December* 31*st*, 1895.

Circular Letter No. 524.

Subject: Texas trust law.

A. M. Finlay, vice-president.

exas managers:

We are sending you by today's mail package of circular letters, hich please send one of each to your agents.

Yours truly, A. M. FINLAY,
Vice-Pres't.

Waters-Pierce Oil Company, St. Louis.

Circular Letter No. 525.

Subject: Texas trust law.

A. M. Finlay, vice-president.

) —— ——.

DEAR SIR: During the recent trial of Manager Hathaway at aco there was some evidence elicited indicating that a few agents the company had on several occasions agreed with retail custom-s to furnish the latter with oils at reduced prices on condition that they would sell to consumers at agreed fixed prices.

3 Managers and agents will therefore refrain from entering into any agreements whatever with customers or from even

making suggestions to them regarding prices at which they shall sell oils to others.

On the other hand, in competing for or to retain trade we have the right to make rebates, sell or refuse to sell certain persons, sell to different persons at different prices, sell at lower prices than competitors make, raise prices, or to make contracts for supplying customers with all oil required by them for a definite or indefinite period, according as circumstances may from time to time require, for we are advised by counsel that such matters are not violative of the trust law.

This circular is intended to take the place of any instructions heretofore given by division managers upon the points mentioned, and should be carefully followed until otherwise directed from this office.

Very respectfully, A. M. FINLAY,
Vice-President.

(The following portion of said circular, to wit:

"Such arrangements, if made, were offered without the authority or knowledge of the company and contrary to its policy and previous instruction on the point," was objected to by the State, because such testimony would be self-serving in its nature and was not competent testimony. The court sustained the objection, and that portion so objected to was excluded; to which the defendants excepted.)

There are sixteen tank stations in my division, with an agent at each station. We have six tank wagons in my division; one at San Antonio. I used three wagons there; the other tank stations are at Laredo, Austin, San Marcos, Taylor, Seguin. We have warehouses also at tank stations. We have 22 warehouses where there are no tanks. We have 38 agencies in my division. We get our
204 supplies of oil from St. Louis. It is shiped to us in tank cars and box cars. The box cars carry case and barrel goods. The case and barrel goods are sold in unbroken packages. The oil received in tank cars is, however, transferred to the stationary tanks, and from there drawn into smaller packages, and in other places it is put in packages and sold in wooden barrels, iron barrels, jacket cans, sometimes into square cans. The company always kept a full stock of oils on hand at those tank and warehouse stations. We have a warehouse at each agency. During the time Dugger was the agent at San Marcos Arthus M. Finlay was the division manager and agent, with headquarters at Galveston.

Cross-examination:

I have been division manager at San Antonio for fifteen or eighteen months. Before that was working as assistant manager, with headquarters at San Antonio, for about a year. We have large tanks at San Antonio. We fill iron barrels and cans from them to ship to other points. They do the same way practically at all other stations. They do this in Austin, Taylor, and there are a

few shipments made in Laredo; that is about all, and San Antonio. I do not know about Dallas and Denison, but we fill a considerable number of iron barrels and cans at San Antonio and ship them out. I have never figured the proportion. About one-half or more of the oil we sell is shipped direct from St. Louis to small towns. The tank stations supply most of the oil in their territory without its being shipped from St. Louis—that is, they supply them with barrel oil, not case oil. They do not supply a large proportion of the case oil, but some. At our warehouse we sometimes sell a merchant any number of cans he may want, provided he is able to pay for it. We sell him one or 500 cans. I would not sell him one can; that would be a broken package. We don't sell broken packages except bulk oil. I fix prices at San Antonio at the time I sold oil there. When the fight was on at San Marcos, about which I testified, I made the price to Hardy and the other merchants. At that
205 time I had just started in and had not much experience in the oil business as manager. I fixed the prices in different localities in the division. I made the selling price for the company—that is, the selling price to the merchant. I consulted those above me sometimes, as I wished. I am responsible for the oil I sell. I report to St. Louis to J. P. Gruet, secretary of the company. St. Louis is the company's general headquarters. My accounts for the sales of oils that I made at reduced rates have been approved all along by the company. There is an item objected to once in a while.

(Defendants objected to this testimony because it involved written correspondence, which is the best evidence thereof; but the court overruled the objection, and the defendants excepted.)

These objections are all limited to the item of expense, not to fixing of prices. There was no objection to the prices. When I put oil at 8 cents in San Marcos, I put it to any merchant who wanted to buy, without discrimination, whether they were dealing in competitive oils or not. They had competitive oils in the house when I made the price. I made no condition that they quit handling competitive oil. This was before the Hathaway trial at Waco. I made no condition with the merchants at San Marcos about fixing the selling prices of the oil. I have not read Mr. Finlay's letter to Pegues. At that time Finlay was my superior officer. I mean Arthur M. Finlay, division agent at Galveston. The Waters-Pierce Oil Company have about a thousand customers in my division. I have received instructions from officers above me sometimes in regard to fixing prices; from Arthur M. Finlay, manager. This was while I was assistant manager. I know of the officer of the company who determines the prices at which oils are to be sold.

The reports I made to Secretary Gruet are in writing. I retained copies of these letters, and whatever action the secretary takes on them is in writing. I have the originals of such communications. They pertain simply to the money transactions.

206 LEWIS FRIES, recalled, testified that when he had testified previously on the trial as to the number of customers in his

division of the Waters-Pierce Oil Company he was thinking only of the open accounts on their books in San Antonio, which was about 1,000. The company deals in my division with about 2,000 merchants.

F. A. AUSTIN testified for the defendants in person as follows:

I am division manager of the Waters-Pierce Oil Company — the eastern division of Texas, with headquarters at Marshall; have been such division manager for about ten years. The circular shown me, of date December 31st, 1895, is an exact copy of a bundle of similar circulars I received early in January, 1896, which I distributed to my local agents at once. There are about 3,000 merchant customers of the Waters-Pierce Oil Company in my division. We sell only to merchants.

The defendants next offered in evidence a portion of the deposition of H. C. PIERCE, president of the Waters-Pierce Oil Company, taken by the State, as follows:

The general officers of the Waters-Pierce Oil Company are H. C. Pierce, president; Andrew M. Finlay, vice-president; J. P. Gruet, secretary; C. M. Adams, treasurer. The directors of the Waters-Pierce Oil Company are H. C. Pierce, Andrew M. Finlay, C. M. Adams, J. P. Gruet, H. M. Tilford. The names of the officers and directors of the company in March, 1882, were W. H. Waters, H. C. Pierce, F. D. Carley, H. A. Hutchins, and W. P. Thompson. The officers were W. H. Waters, president; H. C. Pierce, vice-president; C. M. Adams, secretary and treasurer. The certificates of stock to the Standard Oil Company of New Jersey in the Waters-Pierce Oil Company were issued to said company on May 20th, 1892.

207 I do not know from whom the Standard Oil Company acquired its shares of stock in the Waters-Pierce Oil Company. The old certificates were issued to the trustees of the Standard Oil trust. No stock of the company was issued in the year 1882 to John D. Rockefeller, O. H. Payne, William Rockefeller, J. S. Bostwick, H. M. Flagler, W. G. Warden, Charles Pratt, Benjamin Brewster, and John Archbold, or to either of them. The general offices of the Waters-Pierce Oil Company are located at St. Louis, in the State of Missouri. Its books are kept there. J. P. Gruet, the secretary, has custody of all its books, and the board of directors has control. The Waters-Pierce Oil Company does business in Alabama, Arkansas, Arizona, California, Colorado, Georgia, Illinois, Iowa, Indiana, Indian Territory, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Mississippi, Nebraska, New Mexico, New York, Oklahoma Territory, Ohio, Pennsylvania, Texas, Virginia, West Virginia, Wisconsin, Republic of Mexico, and Central Mexico.

(This testimony as to the States and countries above named was admitted with the express understanding on the part of defendants' counsel that it would contradict the agreement of counsel offered in evidence by the State, and that the answer should be restricted to the sale of products other than illuminating oils except as agreed in said written agreement.)

None of the following-named parties:
Benjamin Brewster,
John D. Archbold,
J. A. Bostwick,
Charles Pratt,
Henry H. Rogers,
H. A. Pratt,
C. M. Pratt,
D. M. Harkness, trustee,
By H. M. Flagler, attorney;
Thomas C. Bushnell,
208 W. C. Andrews,
Charles F. G. Heye,
William T. Wardwell,
William H. Macy,
Estate Josiah Macy, Jr.,
William H. Macy, Jr., ex.;
William H. Macy, Jr.,
A. M. McGregor,
J. M. Camden,
Per H. M. Flagler, attorney;
O. H. Payne,
By H. M. Flagler, attorney;
Geo. F. Chester, trustee;
Geo. H. Vilas, trustee;
W. G. Warden,
H. M. Flagler,
John D. Rockefeller,
William Rockefeller,
J. J. Vandergrift,
Mrs. H. M. Flagler,
By H. M. Flagler;
A. J. Pouch,
O. B. Jennings,
D. M. Harkness,
By H. M. Flagler, attorney;
W. P. Thompson,
By H. M. Flagler, attorney;
S. V. Harkness,
By H. M. Flagler, attorney;
John Huntington,
By H. M. Flagler, attorney;
Lide K. Arter,
By H. M. Flagler, attorney;
H. M. Hanna and George W. Chapin,
By H. M. Flagler, attorney;
Louise C. Wheaton,
By H. M. Flagler, attorney;
O. H. Payne, trustee,
By H. M. Flagler, attorney;
Charles Lockhart,
Joseph L. Warden,
By Henry L. Davis, attorney;
Julia H. York,
Per H. M. Flagler, attorney;
H. A. Hutchins,
By H. M. Flagler, attorney;
M. R. Keith, trustee;
B. Bushnell,
Henry L. Davis,
Warden, Frew & Co.,

John D. Rockefeller, O. H. Payne, William Rockefeller, J. S. Bostwick, H. M. Flagler, W. G. Warden, Charles Pratt, John Archbold, Benjamin Brewster, or either of them, never held any stock in the Waters-Pierce Oil Company. The Waters-Pierce Oil Company have 284 storage tanks in Texas. Directors of the Waters-Pierce Oil Company are elected annually. The directors in 1882 were W. H. Waters, H. C. Pierce, F. D. Carley, W. P. Thompson, and H. A. Hutchins. W. H. Waters was president of the Waters-Pierce Oil Company; was not a member of the so-called Standard Oil trust, and then lived and afterwards died in the city of St. Louis, Mo. H. C. Pierce was vice-president of the Waters-Pierce Oil Company; was not a member of the so called Standard Oil trust, and has lived in St. Louis, Mo., since 1865. F. D. Carley was a stockholder in the Waters-Pierce Oil Company and lived in Louisville, Ky.; was not a
209 member of the so-called Standard Oil trust and was a member of the firm of Chess, Carley & Co., dealers in oil and naval stores. W. P. Thompson lived in Parkersburg, West Virginia; was a member of the firm of J. N. Camden & Co., dealers in coal, etc.; also vice-president of the Camden Consolidated Oil Company, oper-

ating throughout the United States. H. A. Hutchins lived in Cleveland, Ohio, and was manager of the sales department of the Standard Oil Company of Ohio. This board of directors continued several years. In 1892 the present board of directors of the Waters-Pierce Oil Company, consisting of H. C. Pierce, Andrew M. Finlay, J. P. Gruet, C. M. Adams, and H. M. Tilford, were elected, and since then have annually been elected. None of them are or ever were members of the so called Standard Oil trust. The stock of the Waters-Pierce Oil Company now standing in the name of Standard Oil Company of New Jersey was transferred to the Standard Oil Company of New Jersey after the dissolution of the Standard Oil trust, in 1892. John D. Rockefeller, O. H. Payne, William Rockefeller, J. S. Bostwick, H. M. Flagler, W. G. Warden, Charles Pratt, Benjamin Brewster, and John D. Archbold never held any stock in the Waters-Pierce Oil Company, and therefore occasion for suit, as suggested in interrogatory, never existed.

Defendants then offered the following portion of the testimony of said PIERCE:

"The Waters-Pierce Oil Company was never in any manner or form, directly or indirectly, a member of the Standard Oil trust."

To the introduction of which testimony the State, by counsel, objected, on the ground that such testimony, in the form proposed, was incompetent, and that the fact could not be proved in the manner attempted. The court sustained the objection, and the defendants excepted.

I never became, in any manner or form, directly or indirectly, a member of the Standard Oil trust. I was never invited to become a member of the Standard Oil trust.

210 Defendants offered the answer of the witness to cross-interrogatory No. 6, as follows:

"As the Waters-Pierce Oil Company and its predecessors, Waters, Pierce & Co., H. C. Pierce & Co., W. H. Cobb & Co., St. Louis Coal Oil Company, and John R. Finlay & Co., transacted business in petroleum and its products in the territory now known as "southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory, and a part of Louisiana" continuously from the year 1857, and the Waters-Pierce Oil Company was in almost entire control of the business in which it is engaged within the territory mentioned between the date of its organization, which was May 1st, 1878, and the organization of the so-called Standard Oil trust, in the year 1882; also as neither the Waters-Pierce Oil Company or H. C. Pierce have ever been members of the so-called Standard Oil trust, further answer is unnecessary."

(The State objected to said testimony because it was irrelevant and incompetent, and the court sustained the objection, and defendants excepted.)

Witness continued: "I do not understand why the Standard Oil trust did not transact any business in the territory aforesaid, com-

posed of southwestern Missouri, Indian Territory, Oklahoma Territory, and a part of Louisiana; but as during the existence of the so-called Standard Oil trust and for many years prior thereto the Waters-Pierce Oil Company had almost entire control of the petroleum and other business in which it was engaged within the territory mentioned, and also had established their extensive and expensive plants and stations for receiving, handling, and distributing its goods, it would have been unprofitable for the Standard Oil trust or others. In addition to this, the Waters-Pierce Oil Company always has been the largest purchaser in the United States of the goods produced and sold by the Standard Oil Company of Ohio. I have already answered that H. C. Pierce never had been a
211 member of the so-called Standard Oil trust. The Waters-Pierce Oil Company now has invested in the State of Texas in real estate, buildings, plants, machinery, and storage and other construction, tank cars, iron barrels, tank wagons, stock in trade, &c., over $500,000.00. The so-called Standard Oil trust or its trustees never have dictated or controlled the business of the Waters-Pierce Oil Company. The affairs and business of the Waters-Pierce Oil Company always have been directed and controlled by its officers. During the year 1892 and continuously since then four or five of the directors of the Waters-Pierce Oil Company have resided in the city of St. Louis, Mo., and none of its five directors are now and never have been members of the so-called Standard Oil trust. As stated in answer to direct interrogatory No. 27, W. H. Waters and H. C. Pierce, directors in the Waters-Pierce Oil Company, resided in St. Louis, Missouri. The other persons constituting the boards of directors of the Waters-Pierce Oil Company between the years 1882 and 1892 resided in various other places. For instance, Mr. Andrew M. Finlay for a long time was the representative of the Waters-Pierce Oil Company in the Republic of Mexico and at Galveston, Texas, and did not become a director in the Waters-Pierce Oil Company until the year 1890. Mr. C. M. Adams has resided in the city of St. Louis, Mo., since the year 1878, and has been a director in the Waters-Pierce Oil Company since the year 1882. Mr. J. P. Gruet, prior to his connection with the Waters-Pierce Oil Company in the year 1890, resided in Newark, New Jersey. In the year 1890 I employed Mr. Gruet as auditor of the Waters-Pierce Oil Company. In the year 1892 Mr. Gruet was made secretary of and elected a director in the Waters-Pierce Oil Company, in which position he has since been continued. Mr. H. M. Tilford resides in New York city, and is the correspondent of the Waters-Pierce Oil Company in connection with its purchases of petroleum from the Standard Oil Company. The business of the Waters-Pierce Oil Company always has been conducted by its officers with a view to best
212 serving its own interests, and if this has resulted in absence of conflict with the so-called Standard Oil trust it has been not because of any understanding to that effect. The Standard Oil trust or its trustees never have interfered with or dictated the business of the Waters-Pierce Oil Company. Since the Waters-Pierce Oil Company and its predecessors commenced transacting business

in Texas constant and sharp competition has existed there. At the present time the following parties constitute its most active competitors in Texas, to wit: George Rice, Marietta, Ohio; Schofield, Schermer & Teagle, Cleveland, Ohio; Cleveland Refining Company, Cleveland, Ohio; National Refining Company, Cleveland, Ohio; National Oil Company, Cleveland, Ohio; Globe Oil Company, Cleveland, Ohio; Atlantic Refining Company, Cleveland, Ohio; Canfield Oil Company, Cleveland, Ohio; Tropical Oil Company, Cleveland, Ohio; Atlas Refining Company, Cleveland, Ohio; A. G. Harbaugh, Cleveland, Ohio; J. W. Snedaker, New York; Paragon Refining Company, Toledo, Ohio; Craig Oil Company, Toledo, Ohio; Leonard & Ellis, New York; Independent Refining Co., Oil City, Pa.; G. P. Jones & Co., St. Louis, Mo.; J. D. Street & Co., St. Louis, Mo.; Lee Bros., Memphis, Tenn.; Record Oil Company, New Orleans, La.; Lone Star Oil Company, Houston, Texas; J. W. Davis Oil Co., Houston, Texas, etc. The prices at which oils and other products handled by the Waters-Pierce Oil Company within the State of Texas are sold are fixed or regulated by H. C. Pierce, president, or Andrew M. Finlay, vice-president, and the Standard Oil trust has never attempted to dictate or influence such prices. The average annual net profit derived by the Waters-Pierce Oil Company upon its oils sold within the State of Texas is less than 1½ cents per gallon. I do not know of any contracts or agreements for rebates having been made by the Waters-Pierce Oil Company or its agents with parties within the State of Texas during the past eight or ten years in consideration that such dealers would handle the oils of the Waters-Pierce Oil Company and would not buy
213 any oils from any other person or corporation, but deal with the Waters Pierce Oil Company exclusively. I do not know anything about the contracts referred to with W. A. Bryan at McGregor, W. F. Hanning, H. Schmidt at Bremond, or others, and if such contracts and agreements were made they were not authorized by myself."

Defendants offered in connection with the above the following additional statement: "Or by any other officer of the Waters-Pierce Oil Company."

(The State objected to such testimony for the reason that it was not competent for the witness to testify as to the action of any other officer of the Waters-Pierce Oil Company. The court sustained the objection, and the defendants excepted.)

In the year 1894 the Waters-Pierce Oil Company purchased the plants, business, and good will at Dallas, Texas, of the Eagle Refining Company of Cleveland, Ohio, and A. W. Clem, of Dallas, Texas, as a business investment, and employed A. W. Clem to continue in the management of the same. In the year 1892 the Waters-Pierce Oil Company purchased the plant and leased the good will and employed the services of C. W. Robinson at Houston, Texas.

The defendant read certain answers of the deposition of J. P. Gruet, secretary of the Waters-Pierce Oil Company, which depositions were taken by the State, as follows:

The Waters-Pierce Oil Company does business in the States east, west, north, and south of St. Louis, Missouri, as well as in the Republic of Mexico.

(This was read with the understanding that it was not to qualify the agreement of counsel in any manner introduced and read by the State, as hereinbefore set forth, touching the sale of illuminating oils only in southwest Missouri, Indian Territory, Texas, Louisiana west of the Mississippi river, and the Republic of Mexico.)

The following parties did not own any stock in the Waters-Pierce Oil Company, to wit:

214 Benjamin Brewster,
John D. Archbold,
J. A. Bostwick,
Chas. Pratt,
Henry H. Rogers,
H. A. Pratt,
C. M. Pratt,
D. M. Harkness, trustee,
By H. M. Flagler, attorney.
Thomas C. Bushnell,
W. C. Andrews,
Chas. F. G. Heye,
William T. Wardwell,
Wm. H. Macy,
Estate Josiah Macy, Jr.,
Wm. H. Macy, Jr., ex.,
Wm. H. Macy, Jr.,
A. M. McGregor,
J. N. Camden,
Per H. M. Flagler, attorney.
O. H. Payne,
By H. M. Flagler, attorney.
Geo. F. Chester, trustee;
Geo. H. Vilas, trustee;
W. G. Warden,
Henry L. Davis,
John D. Rockefeller,
O. H. Payne,
H. M. Flagler,
John D. Rockefeller,
Wm. Rockefeller,
J. J. Vandergrift,
Mrs. H. M. Flagler,
Per H. M. Flagler.
A. J. Pouch,
O. B. Jennings,
D. M. Harkness,
By H. M. Flagler, attorney.
W. P. Thompson,
By H. M. Flagler, attorney.
S. V. Harkness,
By H. M. Flagler, attorney.
John Huntington,
By H. M. Flagler, attorney.
Lide K. Arter,
By H. M. Flagler, attorney.
H. M. Hannah and
Geo. W. Chapin,
By H. M. Flagler, attorney.
Louise C. Wheaton,
By H. M. Flagler, attorney.
O. H. Payne, trustee,
By H. M. Flagler, attorney.
Chas. Lockhart,
Jos. L. Warden,
By H. M. Flagler, attorney.
Julia H. York,
Per H. M. Flagler, attorney.
H. A. Hutchins,
By H. M. Flagler, attorney.
M. R. Keith, trustee;
D. Bushnell,
Warden, Frew & Co.,
William Rockefeller.

215 J. S. Bostwick, H. M. Flagler, W. G. Warden, Charles Pratt, Benjamin Brewster, and John D. Archbold never held any stock in the Waters-Pierce Oil Company. There are 284 storage tanks belonging to the Waters-Pierce Oil Company in Texas. The Waters-Pierce Oil Company was never, to my knowledge, a member of the Standard Oil trust. I never was a member of the Standard Oil trust. I was never invited to become a member of the Standard Oil trust. There never was any allotment of any terri-

tory, to my knowledge, to the Waters-Pierce Oil Company by the Standard Oil trust. The Waters-Pierce Oil Company have invested in Texas real estate, buildings, plants, machinery, storage tanks, &c., $500,000.00. The business of the Waters-Pierce Oil Company is directed by its officers. The trustees of the Standard Oil trust have not interfered with ir dictated the policy of the Waters-Pierce Oil Company while I have been connected with the company. The Waters-Pierce Oil Company have competition in Texas and always have had since my connection with the company. The prices at which its products are sold within the State of Texas are regulated by H. C. Pierce, president, or Andrew M. Finlay, vice-president. I do not know of any contracts or agreements for rebates. I do not know anything about deals and contracts having been made in Texas by the Waters-Pierce Oil Company with W. A. Bryan, of McLennan county, Texas; W. F. Hanning, of Caldwell, Texas; H. Schmidt, of Robertson county, Texas, and others, under the terms of which the Waters-Pierce Oil Company required such dealers to sell their oils to the public at prices fixed by it or its agents and officers. The Waters-Pierce Oil Company regulates the selling prices of its goods within the State of Texas based upon business requirements.

E. T. HATHAWAY testified in person for defendants as follows:

My name is E. T. Hathaway. I reside at Denison, Texas;
216 have resided in Texas since 1877. I am a married man and have a wife and children and own my homestead at Denison. I am connected with the Waters-Pierce Oil Company, and have been so connected since June, 1878, in the capacity of manager of the Northern Texas division, and am still the manager of that division. There are about 2,000 customers of the Waters-Pierce Oil Company in that division. We have had that number for the past seven or eight years. The headquarters of that division is at Denison. We have fifty tank stations in that division; 27 in Texas. We have not more than eight or ten warehouse stations in Texas which are not tank stations. We employ 30 or 35 agents in that division. The printed circular exhibited me, I received one of these copies. I also received copy of a letter. Exhibit No. 2. They were forwarded to me from Denison the first part of January, 1896, the circular letter and copy attached. I think more of the circulars were received in my office. I was at Waco at that time. I resided at Waco from December, 1895, till June, 1896. I was indicted for violating the trust law, and a verdict was had against me, and pending appeal I was required to stay in custody. I was released by decision of the court of criminal appeals on the 27th day of June, 1896, and since that time the case against me has been dismissed at Waco.

Cross-examined:

Our people do most of the oil business in my division. We do — sell nearly all of the illuminating oils there, but we sell a large percentage of them. We sell a large percentage of the petroleum pro-

ducts also in that division, in addition to the illuminating oils. I am not familiar with the names of the companies that were original members of the Standard Oil Trust, so called. As a general rule, we receive communications nearly every day from the St. Louis office. We are constantly in communication with them. I employ as division superintendent the agents without my territory, and tell them the prices at which they sell. The most of the time I
217 keep posted in the oil markets, and sell what it is necessary to be sold at, and keep up my communications with the local agents accordingly, and in case a fight comes on in a town I reduce the prices to such a point as I deem necessary to meet the competition. I report my work to the St. Louis office. They sometimes make a kick, but not often.

J. W. KEENAN testified for defendants as follows:

My name is J. W. Keenan. I reside in Galveston, Texas, and have resided there about 20 years. I am a native of Texas; am employed at the present time by the Waters-Pierce Oil Company in the capacity of manager of the Southern Texas division. Galveston is the headquarters of my division. I have been manager two years, since June, 1895. My predecessor was Mr. Arthur M. Finlay. He was manager of the division I think about seven or eight years, with headquarters at Galveston all the time. I was assistant manager under Mr. Finlay, with headquarters at Galveston. I have been at headquarters there in Galveston in connection with the division as assistant manager and manager for about ten years—fully ten years or more. Brownsville is in that division. It has been in that division for ten or fifteen years—ten years anyhow—since I have been with the company. The Waters-Pierce Oil Company has no storage tanks at Brownsville. It has a warehouse. The company sells its oils at Brownsville mostly in cases. A case contains 2 five-gallon cans—that is, the cans we sell there—ten gallons to the case. The company gets these oils that are sent to Brownsville and Galveston in cases from New York. They are shipped from New York to Brownsville in cases by steamer, and they are sold in Brownsville in the original packages, just as shipped. I have known incidentally of an arrangement made by my predecessor with Mr. Fernandez and several other parties at Brownsville relative to the sale of oil by which we allowed them a rebate. I never saw the original of that
218 agreement, nor do I know where it is. I have seen a copy and read it. We have about 30 tank stations in the Galveston division. There are about fifty warehouse stations where we have no tanks. We have about 73 agents or 74 employed in my division. My best judgment is, we have about 3,000 merchants in the division who deal with us. The prices of oil is in a measure regulated in St. Louis. I make the prices, but they are subject to inspection and approval by the St. Louis office. I send a copy of my schedule off to St. Louis office once a month to (Arthur) M. Finlay, vice-pres't. I control prices mostly, but it is subject to control at St. Louis. If competitive oil is brought in, I would make

Andrew

prices to meet competition. I have that authority. I report at the end of the month what I do about the business in reducing prices. They never ask any additional compensation from customers and retain me in their employ. Finlay made the trade, paying Lewis, at Lockhart, $300 for his oil business there, but I remitted the money.

The defendants read in evidence the statutes of the State of Missouri authorizing the incorporation of trading companies similar to that of the defendant, and also the statutes and decisions of the supreme court of Missouri thereon, that the transfer and assignment of stock of incorporated companies carried with it the title, and that the companies could be mandamused to issue shares of stock to the parties holding them.

Defendants offered in evidence the charter of the Waters-Pierce Oil Company and copy of permit to do business in Texas, as follows:

STATE OF MISSOURI, *ss*:

I, Alexander A. Lesueur, secretary of state of the State of Missouri, hereby certify that the annexed pages contain a full,
219 true, and complete copy of the articles of association of the Waters-Pierce Oil Company, filed May 7th, 1878, and of the certificate of incorporation issued to said company on the date aforesaid, and of the certificate of increase of capital, filed June 20th, 1882, as the same appears on file and of record, as the law directs, in this office.

In testimony whereof I hereunto set my hand and affix the great seal of the State of Missouri. Done at office in the city of Jefferson this 4th day of May, A. D. 1895.

[SEAL.] A. A. LESUEUR,
Secretary of State.

Articles of Association of the Waters-Pierce Oil Company.

Be it known that we, William H. Waters, of St. Louis, Missouri; Henry C. Pierce, of St. Louis, Missouri; Horace A. Hutchins, of Cleveland, Ohio; Frank D. Carley, of Louisville, Kentucky, and William P. Thompson, of Parkersburg, West Virginia, do by these presents form a body corporate under the name and style of "Waters-Pierce Oil Company," pursuant to and in formity with chapter 37, article 7, of Wagner's Statutes of Missouri, and the several acts of the General Assembly supplementary and amendatory thereof, and we hereby make the following certificate of facts in connection with said corporation, pursuant to the provisions of said statutes, chapter, and acts:

First. The corporate name of said company is hereby certified to be "Waters-Pierce Oil Company."

Second. The objects for which said company is formed are dealing in naval stores and dealing in and compounding petroleum

and other oils and all the products thereof and buying and selling the same in the State of Missouri and other States.

220 Third. The capital stock of said company is hereby certified to be one hundred thousand dollars, which shall be divided into one thousand shares of one hundred dollars each.

Fourth. The number of directors shall be five.

Fifth. The names of the directors who shall manage the affairs of said company during the first year shall be William H. Waters, of St. Louis, Missouri; Henry C. Pierce, of St. Louis, Missouri; Horace A. Hutchins, of Cleveland, Ohio; Frank D. Carley, of Louisville, Kentucky, and William P. Thompson, of Parkersburg, West Virginia.

Sixth. The name of the place in which the business operations of the company shall or may be carried on is the city of St. Louis, State of Missouri, where its principal office shall be located.

Seventh. Said company shall exist the term of fifty years.

Witness our hands and seals this 1st day of May, 1878.

W. H. WATERS. [SEAL.]
H. C. PIERCE. [SEAL.]
H. A. HUTCHINS. [SEAL.]
FRANK D. CARLEY. [SEAL.]

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this first day of May, 1878, before me, a notary public within and for the city and State aforesaid, personally appeared William H. Waters, Henry C. Pierce, Horace A. Hutchins, Frank D. Carley, and William P. Thompson, who are personally known to me to be the same persons whose names are subscribed to the foregoing certificate as parties thereto, and severally acknowledged that they executed the same for the purposes & uses therein mentioned. Qualified May 18, '78. Term expires May 15, 1882. And I further certify that the word "and" was erased in the name of the above corporation, and the words "naval stores and dealing in" were interlined above before signature.

221 Witness my hand & seal notarial the place & date first above written.

{ Copy of seal: James F. Duncan, Notary Public, St. Louis County, Mo. }

JAS. F. DUNCAN,
Notary Public.

Filed and recorded May 1st, 1878, at 12.31 p. m.
D. H. MACADAM, *Recorder.*

NOTE.—The words "naval stores and dealing in," on lines 35 & 36, page 300, & "notarial," on line 11, page 301, of this record, are interlined in the original instrument.

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, the undersigned, recorder of deeds, do hereby certify the foregoing to be a true copy of the articles of incorporation of the Waters-Pierce Oil Company, together with the acknowledgment, &c., thereof, as fully as the same appears of record in my office in Corporation Book, vol. 1, page 300.

Witness my hand and official seal this 1st day of May, 1878.

[SEAL.] D. H. MACADAM, *Recorder.*

Filed and certificate of corporate existence issued May 7th, 1878.

MICH'L K. McGARTH,
Secretary of State.

STATE OF MISSOURI:

Number 1309.

Certificate of Corporate Existence.

Whereas William H. Waters, Henry C. Pierce, Frank D. Carley, and others have filed in this office a certificate in writing, as provided by law, and have in all respects complied with the
222 requirements of the law governing the formation of private corporations for manufacturing and business purposes:

Now, therefore, I, Michael K. McGarth, secretary of state of the State of Missouri, in virtue and by authority of law, do hereby certify that said parties, their associates and successors, have become a body politic and corporate and are duly organized under the name of "Waters-Pierce Oil Company," and have all the rights and privileges granted to manufacturing and business corporations under the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri. Done at the city of Jefferson this seventh day of May, A. D. eighteen hundred and seventy-eight.

[SEAL.] MICH'L K. McGARTH,
Secretary of State.

STATE OF MISSOURI, }
Department of State. }

1309.

Whereas on the twentieth day of June, eighteen hundred and eighty-two, was filed in the office of the secretary of state, as required by law, a duly certified copy of the statement of the proceedings of a meeting held for the purpose of increasing the capital stock of the Waters-Pierce Oil Company, a corporation organized and existing under the laws of the State of Missouri, and said corporation having, in all things, complied with the law made and provided for the increase of capital stock and increasing its capital stock to four hundred thousand dollars:

Now, therefore, I, Michael K. McGarth, secretary of state of the

State of Missouri, in virtue and by the authority of law, hereby certify that the capital stock of said corporation is increased, and that the amount of the capital stock of said Waters-Pierce
223 Oil Company is four hundred thousand dollars.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Missouri. Done at the city of Jefferson this twentieth day of June, A. D. eighteen hundred and eighty-two.

MICHL K. McGARTH,
Secretary of State.

THE STATE OF TEXAS, }
Department of State. }

This is to certify that the Waters-Pierce Oil Company, incorporated under the laws of the State of Missouri for the purpose of "the objects for which said company is formed, and dealing in naval stores and dealing in and compounding petroleum and other oils and all the products thereof, and buying and selling the same in the State of Missouri and other States," with an authorized capital stock of $100,000.00, has this day filed in this department a certified copy of its articles of incorporation in accordance with the requirements of an act of the Twenty-first legislature of the State of Texas, approved April 3, 1889; and I further certify that said corporation has this day paid $50.00, the amount of the fee prescribed by said act; and I hereby declare that said corporation, having complied fully with the law, is entitled to, and is hereby granted, the permission to carry on its business in this State in accordance with the provisions of said act of April 3, 1889, for the term of ten years from the date hereof in accordance with the purpose herein specified.

Witness my official signature and the seal of State affixed, at the city of Austin, the sixth day of July, A. D. 1889.

[L. S.] (Signed) J. M. MOORE,
Secretary of State.

DEPARTMENT OF STATE:

I, Allison Mayfield, secretary of state of the State of Texas,
224 do hereby certify that the within and foregoing is a true copy of the original certificate of the filing in this department of the certified copy of the articles of incorporation of the "Waters-Pierce Oil Company," and of the payment of the fee prescribed by law to entitle said corporation to transact business in this State.

Witness my official signature and the seal of State affixed, at the city of Austin, this 26th day of November, A. D. 1895.

[SEAL.] ALLISON MAYFIELD,
Secretary of State.

Defendants also offered in evidence the following copies of certificates from the Census Bureau at Washington and from the report of the Agricultural Bureau of Texas for 1894, as follows:

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *November* 30, 1896.

Be it remembered that George S. Donnell, whose name is signed to the annexed certificate, was at the date of signing thereof chief of Census division, and that to his attestations as such full faith and credit are and ought to be given.

In testimony whereof I have hereunto subscribed my name and caused the seal of the Department of the Interior to be affixed the day and year first above written.

[SEAL.]

WM. H. ALLEN,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
CENSUS DIVISION,
WASHINGTON, *Nov.* 30, 1896.

Pursuant to section 882 of the Revised Statutes of the United States, I, George S. Donnell, chief of Census division, Depart-
225 ment of the Interior, do hereby — that the paper hereto attached is a true statement of the number of farmers, planters, overseers, agricultural laborers, stock-raisers, herders and drovers, and laborers (not specified) in the State of Texas, as the same appears of record in this office, according to the census returns for 1890.

GEO. S. DONNELL,
Chief of Census Division.

Texas.

Occupation.	Total.	Males.	Females.
Farmers, planters, and overseers.....	279,351	263,548	15,803
Agricultural laborers.....	129,553	111,469	18,084
Stock-raisers, herders, and drovers...	17,819	17,626	193
Laborers (not specified).....	43,326	41,448	1,878
	470,049	434,091	35,958

(To the reading of these papers the State objected on the ground that they were incompetent and irrelevant and not duly certified; which objection the court sustained, and said papers were excluded; to which the defendants excepted.)

Defendants introduced the answers of divers witnesses who test fied by deposition for the State, and whose depositions appeare herein, to the effect that when competing oils were brought into th various towns of Texas about which they have testified they wer

always brought in at a lower price than the prices charged by the Waters-Pierce Oil Company, and that the Waters-Pierce Oil Company reduced its prices to meet such competition.

JOHN D. JOHNSON testified for the State as follows:

I am acquainted with Mr. Dodd, who made the speech at the meeting of the Standard Oil Company shareholders read in
226 evidence. He is a prominent New York lawyer and attorney for the Standard Oil trust. For the speech of Mr. Dodd see Appendix "A."

We, the undersigned, attorneys for plaintiff and defendants, in the foregoing suit of The State of Texas *vs.* The Waters-Pierce Oil Company *et al.*, No. 12589, in the district court of the 26th judicial district of the State of Texas, at Austin, hereby agree that the above and foregoing is a true and correct statement of the facts as proved upon the trial of said cause; which cause was tried at the May term of said court, 1897.

M. M. CRANE,
Attorney General, and
T. A. FULLER, *Assistant,*
Attorneys for Plaintiff, The State of Texas.
JNO. D. JOHNSON,
CLARK & BOLINGER,
Attorneys for Defendants,
The Waters-Pierce Oil Company et al.

Examined and approved and ordered filed.
R. E. BROOKS,
Judge 26th Jud. Dist.

(Endorsed:) The State of Texas *vs.* Waters-Pierce Oil Co. *et al.* Statement of facts. Filed June 26, 1897. Jas. P. Hart, clerk.

Assignments of Error.

Filed July 10th, 1897.

227 In District Court, 26th Judicial District, at Austin, Texas.

THE STATE OF TEXAS
vs.
WATERS-PIERCE OIL COMPANY. } No. 12589.

In the above numbered and entitled cause comes The Waters-Pierce Oil Company, defendant, which has appealed from the judgment hereinbefore rendered in this cause from the district court of the 26th judicial district, and here now files this its assignment of errors as such appellant, and prays the court of civil appeals that the same may be considered on the hearing of said appeal, to wit:

1. The trial court erred in overruling all the demurrers of this defendant, The Waters-Pierce Oil Company, to plaintiff's petition, as shown by the judgment herein rendered.

2. The court erred in overruling the demurrers of this defendant to plaintiff's petition because the acts to define trusts and to provide punishment and penalties therefor, approved March 30th, 1889, and April 30th, 1895, are null, void, and inoperative, and they and their provisions were violative of both the Constitutions of the United States and of the State of Texas, because said statutes discriminated between different classes of persons and citizens of the State of Texas and the United States, and denied to certain persons and citizens the equal protection of the law; all as shown in said demurrers of defendant No. 1.

3. The court erred in overruling this defendant's demurrer on the ground that said acts of March 30th, 1889, and April 30th, 1895, are inoperative and void as to persons resident beyond the territorial limits of the State of Texas and who are not and never have been personally present in the State of Texas, nor done any act within the State of Texas which would subject them to penalties.

228 4. The court erred in overruling the 3rd demurrer of this defendant to plaintiff's petition, because said petition showed upon its face that this defendant was engaged in interstate commerce within the State of Texas, being a foreign corporation, and as such was not amenable in the conduct of its said business of interstate commerce to any law of the State of Texas.

5. The court further erred in overruling defendant's fourth demurrer, which set up and alleged that the said act of March 30th, 1889, did not prohibit a trust or declare it illegal, nor did it declare it an offense or propose to punish it, but merely defined a trust without denouncing it, and said pretended statute was not a law and never had been a penal law in the State of Texas and no suit or prosecution could be maintained under it, the petition of plaintiff showing upon its face that most of the transactions complained of by plaintiff against this defendant occurred prior to the passage of the act of April 30th, 1895.

6. The court erred in overruling the 5th demurrer of defendant to plaintiff's petition, wherein this defendant set up that said acts of the legislature of the State of Texas of March 30th, 1889, and April 30th, 1895, were violative of the Constitution of the United States and of the State of Texas, because said acts constituted an attempt to restrict the rights of certain classes of citizens of the State of Texas and of other States, including this defendant, to carry on their business enterprises in the customary and lawful manner and to fix and limit the prices of merchandise dealt in and offered for sale by them or make such contracts and agreements with merchants and others dealing in similar commodities for the payment to the latter of rebates on commodities sold to them or to make other contracts.

7. The court erred in overruling the 6th demurrer of this
229 defendant, because the matters set up in said demurrer showed that the provisions of said act of the legislature of the State of Texas approved April 30th, 1895, were not expressed in its title, as required by the constitution of the State of Texas.

8. The court erred in overruling defendant's 7th demurrer, which

set up defensively that it appeared upon the face of plaintiff's petition that this defendant, in conformity with the laws of the State of Texas and upon proper and adequate consideration, moving to the State, had entered into a contract with the State of Texas whereby it had a right to do business in the State of Texas for ten years and it was not competent for the State to impair or attempt to impair the obligation of said contract in the manner attempted by said legislation; all as shown in subdivision "*a*" of defendant's demurrer No. 7.

9. The court erred in overruling defendant's demurrer No. 7, subdivision "*b*," because upon the face of plaintiff's petition it was manifest that The Waters-Pierce Oil Company, this defendant, had never been a member of the Standard Oil trust.

10. The court erred in overruling demurrer as set forth in subdivision "*c*" of demurrer No. 7 of this defendant, because the Standard Oil trust agreement set out by the plaintiff in its petition was not at the time it was entered into contrary to the laws of the United States or of the State of Texas, but upon the face of said contract it was in all respects legitimate.

11. The court erred in overruling subdivision "*e*" of this defendant's general demurrer No. 7, because it appeared from the allegations in plaintiff's petition that if the Standard Oil trust agreement was ever entered into at all, such conspiracy was entered into outside the limits and beyond the jurisdiction of the State of Texas and the purpose of said agreement related wholly to com-
230 merce between the States. If such agreement was a conspiracy, the offense was complete immediately upon the consummation of the agreement, and if it related to interstate commerce the State of Texas was without jurisdiction of such conspiracy.

12. The court erred in overruling subdivision "*g*" of this defendant's 7th general demurrer, because upon the face of plaintiff's petition in subdivisions 7, 7½, and 8 it was manifest that the object and purposes of the alleged trust complained of related exclusively to commerce between the States; all as set forth in said subdivisions.

13. The court erred in overruling subdivision "*h*" of this defendant's general demurrer No. 7, because it appeared from the face of plaintiff's petition that the acts and doings of the Standard Oil trust in the different States in the Union were not cognizable in the courts of Texas, and that if any conspiracy against trade was organized thereby it was organized and operated beyond the limits of the State of Texas, to wit, in the State of New York, and for other reasons set forth in said subdivision "*h*."

14. The court erred in overruling subdivision "*i*" of defendant's general demurrer No. 7, because it appeared from the face of plaintiff's petition that this defendant was a corporation of the State of Missouri, and said petition of plaintiff set forth no allegation as to the laws of the State of Missouri or as to what rights, privileges, and franchises were conferred upon this defendant by said laws, and for other reasons stated in said subdivision.

15. The court erred in overruling subdivision "*j*" of this defendant's general demurrer No. 7, because the agreement set forth in

paragraphs 11, 12, and 13 of plaintiff's petition did not constitute violation of law as set forth in said subdivision.

16. The court erred in overruling subdivision "*m*" of this defendant's general demurrer No. 7, because the allegations of plaintiff's petition, as set forth in paragraph 26 thereof, were insufficient, if true, to show that the Waters-Pierce Oil Company had been guilty of any violation of the laws of the State of Texas, for the
231 reasons stated in said subdivision.

17. The court further erred in overruling this defendant's demurrer to paragraphs 11, 12, 13, 14, 15, 16, 17, 18, and 19 of plaintiff's said first amended original petition, for the reasons set forth in said demurrer, to wit, that the allegations of paragraph 11 of plaintiff's said petition showed that if any contracts as therein set forth were entered into with the defendant through any of its local agents it was done prior to April 30th, 1895, and the act of March 30th, 1889, had been repealed and was no longer in force, and for various other reasons set forth in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of said general demurrer.

18. The court erred in overruling this defendant's motion in arrest of judgment after verdict, because this suit was instituted under section 4 of the act approved March 30th, 1889, and under a similar section of the act approved April 30th, 1895, which section prescribed that every foreign corporation violating any of the provisions of said act was thereby denied the right and prohibited from doing any business within this State, and it should be the duty of the attorney general to enforce said provision by injunction or other proper proceeding in the district court of Travis county in the name of the State of Texas. The record shows that this defendant was a foreign corporation engaged *inter alios* in interstate commerce, and, so far as said section 4 attempts to inhibit this defendant or any other foreign corporation from transacting the business of interstate commerce in this State, it is void and inoperative and cannot support a judgment, and it is not competent for the State by this proceeding to prohibit or attempt to prohibit this defendant from doing local trade in the State of Texas, and for other reasons set forth in said motion in arrest of judgment.

19. The court erred in overruling this defendant's motion for new trial, for all the reasons stated in said motion.

232 20. The court erred in paragraph 11 of its charge, to the effect that a corporation is liable for the acts of its agents done in the scope of their employment and agency, because such charge was not applicable to the case upon trial nor to the facts of the case upon trial, in that said charge was pertinent only in a civil cause in a controversy between private persons or corporations for wrongful acts of agents done within the scope of their employment and not in a suit for forfeiture of the charter of a corporation, as in the case at bar.

21. The court erred in paragraph 13 of its charge in instructing the jury substantially that the defendant corporation was bound by the acts of its agents if said agents were acting within the scope of their employment and agency in making certain contracts violative

of the laws of the State of Texas. In such case the agent only is liable for a transaction made by him in violation of law, and it is not to be presumed that such illegal contracts were authorized by the governing body of any corporation, and the evidence was wholly wanting as to any authority on the part of this defendant authorizing any such illegal contracts, if any were made; but, to the contrary, the evidence was uncontradicted that such illegal contracts, if entered into by any agent of the Waters-Pierce Oil Company, were unknown to the defendant company; and, further, because in law when an illegal contract is entered into by the agent of a corporation such corporation is not concluded by acquiescence therein, nor can such corporation ratify said illegal acts of its agents, and said charge of the court is contrary to the law.

22. The court erred in paragraph 16 of its charge in instructing the jury in substance and effect that certain evidence was admitted tending to show inducements offered by agents of this defendant to parties to handle oils of the defendant company exclusively,
233 tending to show refusal of said agents to sell parties handling other oils than those of the defendant company, and discriminations in prices against parties handling oils — than those of the defendant to break down competition were admitted in evidence, not because such acts were unlawful or violative of the laws of the State of Texas, but as bearing upon the question of the course of dealing of the defendant company in this State and as bearing upon the question whether or not defendant company made or entered into any of the contracts, as set out and mentioned in paragraph 10 of the charge, and as to whether or not such contracts or course of dealing were known to the governing officers of the defendant company. Such proof was illegitimate for any purpose and did not tend to establish any such facts or conclusions, as stated by the court, and the court should not have commented thereon or directed the attention of the jury thereto, and the same was a charge substantially upon the weight of evidence.

23. The court erred in paragraph 20 of the charge by instructing the jury in substance and effect that in determining whether or not the agents of the defendant company were authorized to make the alleged illegal contracts, if any were made, and whether the same were known or acquiesced in by defendant's governing officers, it was not necessary for such authority to be shown by positive or direct testimony, but it might be shown by circumstances, and that the jury would take into consideration all the facts and circumstances in evidence before them in determining such question. Said charge was erroneous in the shape in which it was given to the jury, because this proceeding being a quasi-criminal proceeding, it was incumbent upon the court to instruct the jury as to the nature and effect of circumstantial evidence, and the jury should not have been left, as it was by the judge, to find a verdict upon mere suspicion and in the face of positive and direct testimony, uncontradicted, on the part of this defendant that such contracts were not known to this defendant.

234 24. The court erred in paragraph 10 of its charge in instructing the jury in substance and effect that if the defendant company entered into or formed a contract in this State with any parties dealing in oils since July 6th, 1889, by the terms of which contract it was agreed that said parties were to buy oils from the Waters-Pierce Oil Company exclusively for any specified time, and from no other source, in consideration of rebates allowed them by defendant company, when the evidence failed to show any such contract, in that the pretended agreements referred to by the court lacked the essential characteristics of mutuality, for there was no evidence in the record tending to show that defendant company ever agreed with any party in Texas to sell oil exclusively to such party in any particular locality and to no other person; but, on the contrary, each of said contracts or pretended contracts manifested that the defendant company was at liberty at all times to sell its oils to whomsoever it pleased. This charge of the court was without evidence in the record to support it and was contrary to the law.

25. The court further erred in said paragraph 10 of its charge by instructing the jury in substance and effect to find against the defendant if the defendant, acting through its agents, duly appointed and authorized, since July 6th, 1889, made, entered into, and carried out a contract in this State with any of the persons named in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all their oils from the defendant company and not to buy oils from any other source for any specified time, and not to sell said oils so bought from the defendant to any person handling or dealing in oils in competition with defendant, because if any such contract was entered into it did not show a combination in restraint of trade and a violation of the laws of Texas, because said pretended contract

235 lacked the essential characteristic of mutuality and was not binding in any manner upon the defendant company, nor does the charge of the court make it necessary that such pretended contract should bind the defendant company, but under the law as given by the court the effect of the charge was to hold this defendant liable for a contract in restraint of trade without such contract binding this defendant in any manner, nor did any such contract show any combination whatsoever between this defendant and any other person in restraint of trade. Said charge was further erroneous because it instructed the jury in effect that such contracts were illegal if they embraced a provision that the parties purchasing from the defendant company should not sell oils so bought to any other person handling or dealing in competitive oils, because such transaction, if made, was not violative of the laws of the State of Texas.

26. The court erred in refusing to give to the jury special instructions numbers 1, 2, 3, 4, 5, and 6, as requested by defendant, because such instructions were not embodied in the main charge of the court and comprise the law applicable to the several issues raised in the case.

27. The court erred in admitting, over the objections of defendant, the testimony of C. J. Rosenberg, of La Grange, Texas, to the following effect: "When I sold oil at Ellinger in 1886, or about 1886, I received a wholesaler's rebate of 10 cents per case or 1 cent per gallon. I received 1½ cents per gallon here prior to 1895, and am now again receiving the wholesaler's rebate of 1½ cents a gallon for all oil sold for them. These rebates are given as a wholesaler's rebates, to buy exclusively from the Waters-Pierce Oil Company, and was verbal; could be terminated at any time," such testimony being incompetent and irrelevant, because it was no violation of law for the defendant to give these rebates.

28. The court erred in admitting, over the objections of
236 defendant, the answers of the witness M. Lillienstein, to the effect that he had been given rebates by the defendant, because the giving of rebates was not in violation of the laws of Texas, and such evidence was incompetent and immaterial.

29. The court erred in admitting, over the objection of defendant company, the testimony of the witness M. Lillienstein, to the effect that this defendant had discriminated against said witness in 1895, because it would not sell him oil as cheaply as it sold to others, which act did not constitute any violation of the laws of Texas.

30. The court further erred in admitting, over the objections of defendant, the testimony of H. W. Cheney and others, to the effect that this defendant, The Waters-Pierce Oil Company, had refused to sell the witness oil as cheap as it sold to others in the same town, because such testimony was irrelevant and immaterial and showed no violation of the laws of Texas, nor did it tend to prove any issue in the case. The court also erred in admitting similar testimony of many other witnesses, all of which is shown by the statement of facts.

31. The court erred in admitting, over the objections of defendant, the testimony of W. C. Dugger, to the effect that this defendant's agent at Galveston, Arthur M. Finlay, had never objected to any of the acts of said Dugger done in obedience to the instructions of Waggoner and other agents, all as shown by exceptions duly reserved in the statement of facts.

32. The court erred in admitting, over the objections of defendant, the testimony of John Hargrave, to the effect that he had been given rebates by the defendant and as to discriminations against him by defendant, all as shown by exceptions duly saved and incorporated in the statement of facts.

237 33. The court erred in admitting, over the objections of defendant, the testimony of G. F. Wear, to the effect that the defendant's agent at Brownwood offered to give the witnesses lower prices or as low prices than any other oil if witness would handle his oil exclusively; merely showed an offer and no acceptance, and was therefore no agreement in restraint of trade, and was therefore irrelevant and incompetent, all as shown by exception duly reserved in the statement of facts.

34. The court erred in admitting, over the objection of defendant, the testimony of G. M. Raphael, to the effect that he, witness, had

signed a contract of defendant's about the year 1881, the objection to said evidence being that on said date any contract restrictive of trade constituted no violation of the laws of Texas and was legitimate, all as shown by exceptions duly saved in statement of facts.

35. The court erred in admitting, over the objections of defendant, the testimony of Miguel Fernandez, to the effect that the agent of the company had offered to make a contract with the witness, which witness refused, because such transaction showed a mere negotiation without any consummation and was no violation of law, all as shown by exceptions duly reserved in statement of facts.

36. The court erred in refusing to admit in evidence the testimony of William Grice for this defendant, to the effect as to whether or not he as division manager had ever had any authority from any officer of the Waters-Pierce Oil Company to sell oils in Texas on condition that they would be resold at a fixed price, which testimony was excluded by the court and exception saved, as shown by statement of facts.

37. The court erred in refusing to admit the testimony of H. C. Pierce in behalf of this defendant, to the effect that the Waters-Pierce Oil Company was never in any manner or form, di-
238 rectly or indirectly, a member of the Standard Oil trust, all as shown by exception duly saved in the statement of facts.

38. The court erred in refusing to admit in behalf of defendant the testimony of H. C. Pierce, to the effect that if any contracts or agreements were made in violation of the laws of Texas by agents in Texas they were not authorized either by himself or any other officer of the Waters-Pierce Oil Company, all as shown by exception duly saved in the statement of facts.

39. The court further erred in striking out from the circular of the defendant, of date December 31st, 1895, the following words as incompetent, upon objection by the State: "Such arrangements, if made, were effected without the authority or knowledge of the company and contrary to its policy and previous instructions on the point," all as shown by the statement of facts.

40. The verdict is contrary to the law, for reasons stated in this defendant's motion for new trial, paragraph 16, to wit, because the statutes upon which this prosecution is based are violative of the Constitution of the United States and of the State of Texas and will not support any verdict or judgment by reason thereof, and because no judgment can be entered under the provisions of section 4 of the act of 1889, or of a similar section in the act of 1895, by reason of the fact that the defendant, as appears from the testimony, was engaged in interstate commerce, and it is not competent to enter judgment in any State court forbidding or attempting to forbid the defendants from doing such business in the State of Texas.

41. The verdict is contrary to the evidence, for the reasons set forth at length in this defendant's motion for new trial.

42. The court erred in entering judgment upon the verdict rendered, in substance decreeing a forfeiture of defendant's per-
239 mit to do business in this State and enjoining defendant, the Waters-Pierce Oil Company, from doing any business in

Texas, and thereafter providing that nothing in the judgment contained should be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State, because such judgment as entered is contrary to the provisions of the statute upon which the action was instituted and contrary and repugnant to plaintiff's petition and prayer of said petition. Said provision of the statute (section 4) as enacted is unconstitutional and void, and it was not competent for the court by judicial legislation to qualify the force and effect of the statute so as to except from its provisions acts of interstate commerce when the statute makes no such exemption.

JOHN D. JOHNSON,
CLARK & BOLINGER,
Attorneys for Defendant The Waters-Pierce Oil Co.

(Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Assignments of error. Filed July 10th, 1897. Jas. P. Hart, clerk D. C., T. C.

Appeal Bond.

Filed July 10th, 1897.

THE STATE OF TEXAS, }
Travis County. }

In the District Court, 26th Judicial District.

Know all men by these presents that we, the Waters-Pierce Oil Company, a private corporation duly created and organized under the laws of the State of Missouri, as principal, and J. G. Palm, Geo. Clark, and W. B. Abadie, as sureties, are held and firmly
240 bound unto the State of Texas, and also unto E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, in the sum of one thousand dollars, said sum having been fixed by the clerk of the district court of Travis county, Texas, under the provisions of the statute in such cases made and provided as at least double the probable amount of the costs of suit in the court of civil appeals, supreme court, and said district court of the 26th judicial district, which suit is hereinafter mentioned, and for payment of which sum, well and truly to be made, we, said principal and sureties, do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally.

The condition of the above obligation is such that whereas, on the 15th day of June, A. D. 1897, in the district court of said 26th judicial district of the State of Texas, at Austin, in said State, in a certain cause therein pending, numbered and entitled as follows, to wit, number 12589, The State of Texas *vs.* The Waters-Pierce Oil Company *et al.*, The State of Texas, plaintiff in said suit, did recover of the Waters-Pierce Oil Company, principal herein, its judgment of the following substance, tenor, and effect, to wit:

That the defendant The Waters-Pierce Oil Company be, and is

hereby, denied the right and prohibited from doing any business within the State of Texas, and that its permit to do business in said State, heretofore granted by said State, be, and the same is, cancelled and held for naught, and that said Waters-Pierce Oil Company, its managers, agents, &c., be, and are hereby, perpetually enjoined from doing business in Texas; but nothing contained in said judgment shall be construed to apply to or in any — effect or prohibit said defendant's right to engage in interstate commerce within the State of Texas. Said judgment also awards all costs to the State against the Waters-Pierce Oil Company, with execution, and awards all proper process for enforcing said judgment, and further
241 awards judgment against the State of Texas in favor of E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, defendants, with costs in their favor against the State.

And the said E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, who were jointly sued with said principal, The Waters-Pierce Oil Company, as defendants, did recover their judgment against the State of Texas in substance and effect that they go hence without day and do have and recover their costs of said State of Texas; from which said judgment aforesaid the said principal herein, The Waters-Pierce Oil Company, is desirous of prosecuting its appeal in terms of law to the court of civil appeals for the third supreme judicial district of Texas and has given notice of such appeal in open court and now desires to perfect said appeal by executing its cost bond therefor in terms of law:

Now, if the Waters-Pierce Oil Company, appellant as aforesaid, shall prosecute its appeal with effect and shall pay all costs which have accrued in the court below and which may accrue in the court of civil appeals and the supreme court, then and in that event this obligation shall become null and void; otherwise to remain in full force and effect.

Witness our hands on this the 10th day of July, A. D. 1897.

THE WATERS PIERCE OIL COMPANY,
By CLARK & BOLINGER, *Its Attorneys.*
J. G. PALM.
GEO. CLARK.
WM. B. ABADIE.

Approved this 10th day of July, A. D. 1897.

JAS. P. HART,
Clerk District Court, Travis County, Tex.

(Endorsed:) 12589. The State of Texas *vs.* Waters-Pierce Oil Co. Appeal bond. Filed July 10th, 1897. Jas. P. Hart, clerk D. C., T. C.

242 *Supersedeas Bond.*

Filed July 10th, 1897.

THE STATE OF TEXAS, }
Travis County. }

In the District Court, 26th Judicial District.

Know all men by these presents that we, the Waters-Pierce Oil Company, a private corporation duly created and organized under the laws of the State of Missouri, as principal, and J. G. Palm, Geo. Clark, and W. B. Abadie, as sureties, are held and firmly bound unto the State of Texas, and also unto E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, in the sum of two thousand dollars, said sum being at least double the amount of the judgment, interest, and costs hereinafter mentioned, and for payment of which sum, well and truly to be made, we, said principal and sureties, do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally.

The condition of the above obligation is such that whereas on the 15th day of June, A. D. 1897, in the district court of said 26th judicial district of the State of Texas, at Austin, in said State, in a certain cause therein pending, numbered and entitled as follows, to wit, number 12589, The State of Texas *vs.* The Waters-Pierce Oil Company *et al.*, The State of Texas, plaintiff in said suit, did recover of the Waters Pierce Oil Company, principal herein, its judgment of the following substance, tenor, and effect, to wit:

That the defendant The Waters-Pierce Oil Company be, and is hereby, denied the right and prohibited from doing any business within the State of Texas, and that its permit to do business in said State, heretofore granted by said State, be, and the same is, cancelled and held for naught, and that said Waters-Pierce Oil Com-
243 pany, its managers, agents, &c., be, and are hereby, perpetually enjoined from doing business in Texas, but nothing contained in said judgment shall be construed to apply to or in any way effect or prohibit said defendant's right to engage in interstate commerce within the State of Texas. Said judgment also awards all costs to the State against the Waters-Pierce Oil Company, with execution, and awards all proper process for enforcing said judgment, and further awards judgment against the State of Texas in favor of E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, defendants, with costs in their favor against the State.

And the said E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, who were jointly sued with said principal, The Waters-Pierce Oil Company, as defendants, did recover their judgment against the State of Texas in substance and effect that they go hence without day and do have and recover their costs of the said State of Texas, from which said judgment aforesaid the said principal herein, The Waters-Pierce Oil Company, is desirous of prosecuting its appeal in terms of law to the court of civil ap-

peals for the third supreme judicial district of Texas, and has given notice of such appeal in open court and now desires to perfect said appeal by executing its supersedeas bond in terms of law in addition to its cost bond.

Now, if The Waters-Pierce Oil Company, appellant as aforesaid, shall prosecute its appeal with effect, and in case the judgment of the supreme court or the court of civil appeals shall be against it, it shall perform its judgment, sentence, or decree and pay all such damages as said courts may award against it, then and in that event this obligation shall become void; otherwise to remain in full force and effect.

Witness our hands on this 10th day of July, A. D. 1897.

THE WATERS-PIERCE OIL COMPANY,
By CLARK & BOLINGER,
Its Attorneys.

244 J. G. PALM.
GEO. CLARK.
WM. B. ABADIE.

Approved this the 10th day of July, A. D. 1897.

JAS. P. HART,
Clerk District Court, Travis County, Texas.

(Endorsed:) 12589. State of Texas *vs.* Waters-Pierce Oil Co. Supersedeas bond. Filed July 10th, 1897. Jas. P. Hart, clerk D. C., T. C.

Bill of Costs.

THE STATE OF TEXAS
vs.
THE WATERS-PIERCE OIL COMPANY ET AL. } No. 12589.

To officers of court, Dr.

Clerk's Fees.

	Dolls.	Cts.
Docketing suit		20
Entering appearances	1	25
Entering 2 motions		30
" 5 orders	3	75
Filing 41 papers	6	15
Entering judgment	1	35
Taxing cost		25
Issuing 3 subpœnas		75
" 6 additional names		90
Swearing witnesses (8)		80
Issuing copies of interrogatories and precepts	17	10
" " " " " commissions	196	15
Opening and filing depositions (23)	3	45

245 *Clerk's Fe-s Continued.*

	Dolls.	Cts.
Receiving and recording verdict		35
Swearing jury		35
Taxing bonds (2)	3	00
Transcript	171	60
Clerk's costs	$407	50

Sheriff's Fees.

	Dolls.	Cts.
R. E. White, subpœna & mileage	2	25
Jury fee (paid by defendant)	5	00
J. W. Baker, sheriff McLennan Co., serving precepts	5	45
Sheriff's costs	$12	70

Miscellaneous Costs.

	Dolls.	Cts.
Notary fees:		
Depositions of J. S. Lewis	6	90
" " J. E. Dunning *et al.*	6	00
" " Sam. G. Eckles	6	40
" " F. Q. Rast *et al.*	10	25
" " W. C. Dugger	5	55
" " F. M. Ramsey *et al.*	6	00
" " R. C. Braden	6	80
" " M. H. Cross *et al.*	24	45
" " H. C. Pierce *et al.*	27	50
" " D. F. Hair	5	00
" " T. P. Stillwell	19	80
" " T. J. Lovelace	20	00
I. Liebreich *et al.*	6	50
" " H. A. Dennett	2	50
" " W. C. Barker	4	50
" " M. Lillienstein *et al.*	10	48
" " C. J. Rosenberg	2	00

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Depositions of J. H. McClarty	10	50
" " A. W. Carpenter	5	00
" " L. R. Graham	3	60
" " J. L. Jones (estimated)	3	00
" " C. A. Lawler, "	3	00
" " John D. Klepper (estimated)	2	00
Total notary fees	$197	73
Chas. E. Pickle, stenographer (p'd by def't)	110	00
Miscellaneous costs	$307	73

Recapitulation.

Clerk's costs	$407 50
Sheriff's costs	12 70
Miscellaneous costs	307 73
Total costs	$727 93

Clerk's Certificate.

THE STATE OF TEXAS, }
County of Travis. }

I, Jas. P. Hart, clerk of the district court within and for the county and State aforesaid, do hereby certify that the within and foregoing 281 pages *is* a true and correct transcript of all the proceedings had in this court in cause No. 12589, of The State of Texas *vs.* The Waters-Pierce Oil Company *et al.*, as the same appear now of record and on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 20th day of July, A. D. 1897.

[SEAL.] JAS. P. HART,
Clerk District Court, Travis County, Texas.

247 (Endorsed:) 1974. Waters-Pierce Oil Company, appellant, *vs.* The State of Texas, appellee. From the district court of Travis county, 26th judicial district. Applied for by Messrs. Clark & Bolinger, attorneys for appellant, on the 22nd day of July, A. D. 1897, and delivered to the said above-named attorneys on the 22nd day of July, A. D. 1897. Jas. P. Hart, clerk of the district court of Travis county. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, Sep. 2, 1897. R. H. Connerly, clerk.

248 PROCEEDINGS IN COURT OF CIVIL APPEALS.

Order of Submission.

WATERS-PIERCE OIL COMPANY }
vs. } No. 1974.
STATE OF TEXAS. }

Appeal from Travis county.

December 11th, 1897.—Submitted on briefs and oral arguments of both parties.

Opinion of Court of Civil Appeals.

Filed March 9th, 1898.

WATERS-PIERCE OIL COMPANY
vs.
THE STATE OF TEXAS. } No. 1974.

Appeal from Travis county.

Statement of the Case.

The object of this suit, the laws under which it is brought, and the issues involved are so accurately stated in the admirable charge of the trial court, that we set it out in full, as giving all the information needed upon these questions:

"1. This is a suit by the State of Texas, as plaintiff, against
249 The Waters-Pierce Oil Company, a private corporation, and E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, as defendants, to cancel the permit of said Waters-Pierce Oil Company to do business in this State and to enjoin all of said defendants from further transacting the business of said company in this State, on account of an alleged violation of the laws of this State against trusts by said company, its agents and employees.

"2. The plaintiff alleges that the defendant Waters-Pierce Oil Company is a private corporation, incorporated under the laws of the State of Missouri for the purpose of dealing in petroleum and its products and in selling the same in the State of Missouri and other States, and that on July 6th, 1889, said company filed its articles of incorporation in the secretary of state's office in this State, and secured a permit to transact its said business in the State of Texas for a term of ten years, as provided by the laws of this State, and that since said date defendant company has been transacting its said business in this State, and has divided this State into five general divisions for the purpose of transacting its said business, and that the defendants E. T. Hathaway, F. A. Austin, William Grice, J. W. Keenan, and Lewis Fries are the respective managers of defendant company in said general divisions of this State, and have appointed various local agents through this State for the transaction of its business.

"3. Plaintiff further alleges that the defendant company has violated the law of this State against trusts by making and entering into a contract with and becoming a member of the Standard Oil trust, which contract and agreement is set out in plaintiff's petition, and for doing certain other acts in connection with said Standard Oil trust agreement.

"3½. Plaintiff also alleges that the defendant company has violated the law of this State against trusts by entering into a contract

with the Eagle Refining Company, with C. W. Robinson,
250 with J. L. Lewis, and Stillwell Bros., as set out in plaintiff's petition and introduced in evidence before you.

"4. Plaintiff further alleges that since July 6th, 1889, said defendant company has been and still is engaged in dealing in and selling the products of petroleum in this State, and that during that time said company has made and is still making, through its agents in this State, contracts and agreements by and between said company and other parties dealing in, buying, and selling similar oils in this State, by the terms of which agreements said parties, for a valuable consideration paid them by defendant company, agreed and contracted that they would not buy any oils from any other person or corporation, but would deal with and buy and sell oils obtained from said defendant company exclusively; that said company has further contracted with certain of said persons, as aforesaid, for a valuable consideration paid by defendant company to said parties, by the terms of which said parties contracted and agreed to buy from and sell the oils of defendant company exclusively, and not to sell the oils so bought, as aforesaid, to any one buying from or dealing with any other person or corporation dealing in such oils in competition with said defendant company; and further, that said company, since July 6th, 1889, has made and entered into other contracts and agreements by and between it and various others dealing in, buying, and selling oils, by the terms of which said parties agree with said company to purchase its said oils and to sell the same to others desiring to purchase the same, at prices fixed and established by it or its agents and officers. The names and dates and contracts above referred to are set out in plaintiff's petition.

"5. Plaintiff further alleges that prior to July 6th, 1889, and also since that date the defendant company entered into certain
251 contracts in writing with certain parties in Brownsville, Texas, by the terms of which said parties bound themselves to buy all their oil from defendant company for a fixed period in consideration of certain rebates allowed them by defendant company, and also agreed to sell such oil at a price fixed by defendant company, and that such contracts as were entered into prior to 1889 have been carried out and executed and business done thereunder by said parties since that date to the present time. The parties with whom said contracts were made and the terms thereof are set out in plaintiff's petition.

"6. Plaintiff alleges that all of said contracts above mentioned were made by the agents of said defendant company and were authorized by it and were fully ratified and carried out by it after same had been so made, and that the same were a violation of the laws against trusts of this State; that the products of petroleum are articles of prime necessity to the people of this State, and that by reason of said acts and contracts said defendant company has forfeited its right to transact business in this State and prays for an injunction prohibiting the defendant company, its agents and em-

ployees, from further violating said statute and for a decree cancelling the permit of said company to do business in this State.

"7. The defendants answer by a general denial of all the allegations of plaintiff's petition, and especially answer that the Waters-Pierce Oil Company is the real defendant in this action, and that the other parties named as defendants are simply its agents in the State of Texas.

"It further says that the State of Texas is estopped from cancelling defendant's permit to do business in this State, because that on July 6th, 1889, through its proper officers and in pursuance of the provisions of the law of this State, did, for a sufficient and
252 lawful consideration, issue to said company a permit to do business in this State for a term of ten years from that date, and that said permit was a valid and binding contract between it and the State of Texas.

"8. Defendant further pleads that it is a foreign corporation of the State of Missouri, having its principal office in said State of Missouri, and that the business transacted by it in the State of Texas was interstate commerce and not subject to the laws of the State of Texas.

"Defendant denies that it ever became a member of or a party to the Standard Oil trust agreement, or that it acted with said trust or was controlled by said trust in any way; that said trust was dissolved March 21st, 1892.

"Defendant denies that it ever entered into any of the contracts or agreements with the parties named in plaintiff's petition for the sale of its oils, and that if any such contracts or agreements were entered into, as set forth in plaintiff's petition, with any one representing the defendant company, either as agent, attorney, employee, servant, or otherwise, the same was never known to the defendant company, nor did it ever sanction or ratify such contract, either directly or indirectly. Wherefore they pray that plaintiff take nothing by this suit.

"9. Upon the law of the case you are instructed as follows:

"Under the laws of this State a trust is defined as follows:

"A trust is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for either, any or all of the following purposes:

"(1.) To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.
253 "(2.) To increase or reduce the price of merchandise, produce or commodities.

"(3.) To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"(4.) To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any ar-

ticle or commodity or merchandise, produce or commerce intended for sale, use or consumption in this State.

"(5.) To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity or article of trade, use merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they *sell* in any manner, establish or settle the price of any article or commodity or transportation, between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

"10. Now, if you find from the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying, and selling oils, as named and set out in plaintiff's petition, since July 6th, 1889, by the terms of which contract it was agreed that said parties were to buy
254 oil from the defendant company exclusively for any specified time and from no other source, in consideration of rebates allowed them by the defendant company or for any other valuable consideration; or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into, and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves, for a valuable consideration, to buy all their oils from defendant company and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company; or if said defendant company, so acting since said date, made and entered into and carried out in this State a contract with any of the parties, as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that said contracts had been made, consented to and ratified or carried out the same after they were made,

then you are instructed that the defendant would be guilty of violating the law against trusts of this State; and if you so find the facts to be as above stated, you will return a verdict for the plaintiff against the defendant The Waters-Pierce Oil Company.

255 "11. You are further instructed that a corporation can only act through its agents and servants, but a corporation is not — for all the acts of its agents or servants. It is liable, however, for the acts of its agents, done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents which have been acquiesced in or ratified by the governing body of said corporation.

"12. Now, if you find from the evidence that any or all of the contracts mentioned in section 10 of this charge were made and carried out by the defendant company, acting through its agents with the parties therein named, but you do not find that said agents were authorized by the governing body of said corporation to make said contracts, nor that said contracts were made in the scope of the duty and employment of such agents, and do not find that said contracts, if any were made, were known to or acquiesced in or consented to by the governing body of said corporation, after being made by said agents, then you will return a verdict for the defendant company.

"13. But if you find said contracts mentioned in section No. 10 of this charge were entered into by the defendant company, acting through its agents, and that said agents were acting in the scope of their employment and agency in making said contracts, or if said contracts were not authorized by the governing body of said corporation, that it acquiesced in or consented to or ratified said acts, after knowing the same had been entered into, then said defendant company would be liable for such acts.

"14. You are further instructed that this court has no jurisdiction over and the laws of this State do not apply to interstate commerce—that is, to commerce between the different States of

556 the United States. Shipments of oils or other products made by the Waters-Pierce Oil Company from points without this State to its agents within this State is interstate commerce until such oils are sold by said company in the original packages in which it was shipped into this State, and as such is not subject to the laws of this State regulating the sale thereof, and if the evidence introduced before you shows any of the contracts set out in plaintiff's petition were made in reference to interstate commerce, then you will not consider such contracts further, as the laws of this State do not cover such transactions; but, on the other hand, if the Waters-Pierce Oil Company shipped oil from points beyond this State to its agents to points within this State, and after their receipt in this State the same were sold by said agents in this State to parties in this State in broken packages or by retail, and not in the original packages in which said oils were shipped into this State, then such business is not interstate commerce and is subject to the laws of this State. You are further instructed that, even though the contract

may have reference to interstate shipments of oils, yet if the parties go farther and contract that such oils, after being sold by said Waters-Pierce Oil Company to parties in this State, shall be sold by said parties at a price fixed by the duly authorized agents of defendant company, then you are informed that such dealing with said oils, after its sale to parties in this State, is not protected by the interstate commerce laws, but such contracts, if made, are subject to the laws of this State.

"15. You are instructed that the law against trusts in this State became a law on March 30th, 1889, and was amended in 1895, and the defendant company obtained its permit to do business in this State on July 6th, 1889, and all transactions in evidence before you of date prior to July 6th, 1889, are immaterial in this case except
257 where such contracts were continued and carried out subsequent to July 6th, 1889, and for the purpose of showing the course of dealing of said company in this State, and such transactions prior to July 6th, 1889, are no ground for forfeiture of defendant's permit to do business.

"16. There has been certain evidence introduced before you tending to show efforts and inducements offered by the agents of the defendant company to parties to handle oils of defendant company exclusively, and tending to show refusal of the agents of said company to sell parties handling other oils than those of defendant company and of discrimination in prices against parties handling other oils than those of defendant company and of cutting of prices by defendant Co. to break down competition. None of these things are unlawful, and *was* only admitted as bearing upon the question of the course of dealing of defendant company in this State and as bearing upon the question whether or not the defendant company made or entered into the contracts or any of them, as set out and mentioned in section 10 herein, and as to whether or not such contracts or course of dealing, if any such there was, was known to the governing officers of the defendant company or was authorized by them.

"17. There has been introduced in evidence before you a certain contract known as the Standard Oil trust agreement, and certain evidence tending to show that the defendant Waters-Pierce Oil Company became a member of and entered into said agreement. You are instructed that the evidence is not sufficient to show that defendant became a member of said organization, if at all, in a manner that violates the trust laws of this State, and you will therefore disregard all testimony upon this branch of the case.

"18. There has also been introduced in evidence before you
258 certain evidence in regard to a contract made by the defendant company with the Eagle Refining Company and also with C. W. Robinson, with J. L. Lewis, and Stillwell Bros., in the State of Texas, by which they purchased the business of such concerns. You are instructed that such transactions as these are not believed to be in violation of the laws of this State, and the evidence in regard to these transactions will only be considered by you as bearing upon the course of dealing of defendant company in this State.

"19. The questions for you to determine in this case are:

(1.) Were any of the contracts mentioned in section 10 of this charge made and entered into and carried out by the defendant company in this State since July 6th, 1889, acting through its agents?

(2.) Whether such agents were acting in the scope of their authority and employment in making such contracts, or, if not, whether same were ratified or acquiesced in by defendant company after they were so made.

(3.) Whether said contracts, if any, relate to interstate commerce or to business within this State.

"20. In determining whether or not the agents of defendant company were authorized to make the contracts alleged, if any were so made, or whether same were known to or acquiesced in by defendant company's governing officers, the same does not necessarily have to be shown by positive or direct testimony, but may be shown by circumstances, and you will take into consideration all the facts and circumstances in evidence before you in determining this question.

"21. You will return a verdict for the defendants Hathaway, Austin, Grice, Keenan, and Fries, as they are only the agents of defendant company and not liable in this suit. If you find a verdict for the plaintiff, you will say, 'We, the jury, find for the plaintiff, The State of Texas, against the defendant Waters-Pierce Oil Company and in favor of the individual defendants,' naming
259 them. If you find for the defendant company, you will say, 'We, the jury, find for all the defendants, and that plaintiff take nothing by this suit.'

"22. The burden of proof is on the plaintiff to show by a preponderance of the evidence the facts necessary to entitle it to recover.

"23. The jury are the exclusive judges of the credibility of the witnesses, the facts proven, and the weight to be given the testimony, but are bound to receive the law from the court and be governed thereby."

A verdict was rendered for the State against the Waters-Pierce Oil Company, but against the State in favor of Hathaway and the other defendants; upon which verdict judgment was entered denying to the Waters-Pierce Oil Company the right to do any business in Texas and perpetually enjoining said company and its agents from doing business in Texas, but adding this provision by way of qualification, viz: "Nothing herein contained shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State."

Opinion.

It is needless for us to set out the evidence upon which we base our conclusions of facts, as it is sufficient for us to state that we find that there is evidence which tends to establish the combination of facts as set out in the tenth subdivision of the charge of the

court, and that these facts constitute a violation of the anti-trust laws of this State, and that the appellant, through its agents, with knowledge of the facts, was connected with those transactions, and that there is some evidence which supports the two propositions of law given in subsequent portions of the fourteenth subdivision of the charge which takes the conduct complained of out of the domain of interstate commerce.

260 From these conclusions we find that the facts warrant the judgment rendered, and that it should not be disturbed unless for some legal grounds affecting its validity. The appellant is a foreign corporation, domiciled in Missouri, engaged in business of shipping and selling oils within this State, and there is some evidence which shows that they are dealing in oils as a business within this State.

The charge of the court sufficiently defines what under the statutes of this State is an illegal trust and combination, and we may add that the first act upon the subject, which went into effect March 30, 1889, exempted from its operation agricultural products and live stock while in the hands of the producer and raiser, and the second act, which went into effect April 30, 1895, which was intended to repeal the act of 1889 (and was in its general features much similar to that act), contained the same exemption as to agricultural products and live stock while in the hands of the raiser or producer, with also an exemption from its operation of labor organizations created for the purpose of maintaining a standard of wages. Both acts provide for a forfeiture of the charter of domestic corporations and of permit of foreign corporations to do business in this State as a penalty for the infraction of the provisions of the statutes.

It is insisted that the statute in question illegally infringed upon the liberty of the citizen to contract concerning his property and deprives him of his property and imposes restraints and burdens upon it without due process of law. The fourteenth amendment to the Constitution of the United States, from which these rights flow, extends its benefits in these respects to corporations as well as persons (Minneapolis R'y Co. *vs.* Beckwith, 129 U. S., 28; Covington Turnpike Co. *vs.* Sandford, 164 U. S., 592), but a consideration of these questions necessarily leads to the enquiry whether the statutes that are assailed arise out of an exercise of the general police

261 authority of the State, for upon a solution of that question much depends the proper answer to be given to the contention of appellant.

The State may, in the exercise of its police power, legislate concerning many matters which but for the authority in this respect would be unauthorized. This power, generally stated as the "police power of the State," extends to a variety of subjects which need not be enumerated, as it is generally admitted that matters and subjects which affect the general welfare and public interests are within supervision of this power. The court, in the case of Munn *vs.* Illinois, 94 U. S., 124, speaking of this power, say: "But it does authorize the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure

another's. This is the very essence of government and has found expression in the maxim *Sic utere tuo ut alienem non laedes.* From this source come the police powers, which, as was said by Chief Justice Taney in the License cases, 5 Howard, 583, 'are nothing more or less than the powers of government, inherent in every sovereignty * * * that is to say * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another and the manner in which each shall use his own property when such regulations become necessary for the public good."

"The State can now, as before, prescribe regulations for the health, good order, and safety of society and adopt such measures as will advance its interests and prosperity." R'y Co. *vs.* Beckwith, 129 U. S., 29.

"The police power of the State is the authority vested in the legislature to enact all such wholesome and reasonable laws * * * as they may deem conducive to public good." State *vs.* Moore, 104 N. C., 71 (S. C. Am. St. Reps., 698).

"All property is held subject to the power of the State to
262 regulate or control its use to secure the general safety of the public welfare. 'We think it is a settled principle,' says Chief Justice Shaw in Com. *vs.* Alger, 7 Cush., 84, 'growing out of the nature of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare.' Judge Redfield, in a passage often cited with approval, speaking of the police power, says: 'By this general police power of the State persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, of the perfect right of the legislature to do which no question ever was or upon acknowledged general principles can be made.' Thorp *vs.* R'y Co., 27 Vt., 140. The police power, so called, inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from disturbing conflicts." Bertholf *vs.* O'Reiley, 74 N. Y., 521.

The State in the exercise of this power, in the selection of remedies looking to the suppression of evils harmful to its people, may apply them to the most sacred contracts and to the uses of property of every description, not in the way of an arbitrary spoliation or confiscation under a capricious exercise of the police power, but a useful regulation of the interest of the public welfare. Cooley, Constitutional Limitations (sixth edition), 707 to 720.

In enumerating the subjects which may be acted upon by the State in the exercise of its police power, Mr. Tiedman, in his valuable work on "Limitations of Police Powers," names combinations in restraint of trade, sec. 96; and as said in United States *vs.* Freight

Association, 166 U. S., 322: "Manufacturing or trading com-
263 panies may also affect prices by joining together, in forming a trust for other combinations, and by making agreements in restraint of trade and commerce, which, when carried out, affect the interests of the public."

This is certainly a just acknowledgment of the power, for there are few acts which individuals may engage in that are more harmful in their effects upon the interests of the people generally than trusts and combinations concerning the commodities useful to mankind.

The rights of the individual must yield to the public wants, and his conduct and all property held by him is subject to the control of the State, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible. As said in Munn *vs.* Illinois, 94 U. S., 113, "While power does not exist with the whole people to control rights that are purely and exclusively private, government may require each citizen to so conduct himself and so use his own property as not unnecessarily to injure another." Mugler *vs* Kansas, 123 U. S., 660.

This is one of the inherent rights of sovereignty, and it is as much in place that it shall be exercised when the public interest requires as it is the duty of the State, by stringent laws, to protect society from the depredations of the thief and the ravages of the murderer. When it is once admitted that a matter is a subject of police supervision, the expediency and wisdom of the means resorted to are subjects solely confided to the legislative department of the State, subject, however, to limitations imposed by the organic law of the nation in excluding from their jurisdiction, for many purposes, certain matters of control solely reserved to the National Government. Such, for instance, as many of the matters relating to interstate commerce. It is not meant by this that a legislature may conclusively declare a matter subject to its police authority, when
264 in fact such is not the case, for that is a question which the courts may determine, and under the guise of that power, by a system of confiscation and spoliation, which has no place in our Government, deprive a citizen of his rights, but, as said before, when it is once determined that the subject dealt with really concerns the public welfare, it lies wholly within the police authority of the State, through its law-makers, to determine how it shall be handled and dealt with. R'y Co. *vs.* Mathews, 165 U. S., 16.

By adequate laws looking to the suppression of the evil, the State through the exercise of its police power must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints imposed in this way have never been held to illegally impair his liberty, as is attested from many of the provisions of the codes of this State and of others and the constructions that have been given to them. The freedom of speech, the liberty of person, and life itself must be surrendered when the public interests and the order of good government so requires. The liberty of the citizen, which embraces the legal right to his property and to lawfully contract concerning it, stands upon no higher ground.

In Soon Hing *vs.* Crowley, 113 U. S., 709, the court said: "The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times is equally without force. However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws." Crowley *vs.* Christensen, 137 U. S., 89.

The objection to the statutes that they deprive the owner of his property without due process of law is equally untenable. It was not the design of the fourteenth amendment of the Constitution of the United States to interfere with a just and proper exercise of the police power by the States. Barbier *vs.* Connolly, 113 U. S., 31; Davis *vs.* Massachusetts, 167 U. S., 47. And when we determine, as we have, that the measures in question provided by these statutes were proper police regulations, we went far towards conclusively answering the objections to the statutes on the ground that they deprive the owners of their property without due process of law. If legislative authority exists to restrain the conduct of owners in a particular way in the use of their property deemed injurious to the public welfare, and the legislature having acted in the manner required in passing laws, due process of law exists, in so far as it is necessary to find legal authority for prohibiting the act. Legal restraints imposed upon the use of property does not deprive the owner of it without due process of law. R'y Co. *vs.* Mathews, 165 U. S., 23; R'y Co. *vs.* Hume, 115 U. S., 519; Barbier *vs.* Connolly, 113 U. S., 31; Walston *vs.* Navin, 128 U. S., 582; R'y Co. *vs.* Gibbs, 142 U. S., 387; Bertholf *vs.* O'Reiley, 74 N. Y., 519; Mugler *vs.* Kansas, 123 U. S., 653.

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In the case last cited the Supreme Court, in passing upon a statute of Kansas, which in effect deprived owners of intoxicating liquors of their right to pursue the avocation of selling and disposing of that class of property, at length reviewed this question, and also that aspect of those statutes which tended to interfere with the liberty of the citizen. The conclusion was reached that the matter was the subject of police regulation, and the restraints imposed upon the use of the property in the prohibited way did not illegally affect the liberty of the citizen or deprive him of his property without due process of law.

The statutes here in question do not arbitrarily by legislative decree *ipso facto* operate upon the liberty of the citizen or upon his property and deprive him of these rights; but it provides for an orderly procedure in the courts of the State, with a right of the accused to be heard before being condemned. "The burden imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as

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is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law." Davidson *vs.* New Orleans, 96 U. S., 104.

The statutes are next assailed upon the ground that they are class legislation and deny to certain citizens and classes equal protection of the laws, and that the classification of subjects upon which the laws should bear and those who are exempted from its operations are purely capricious and arbitrary, in that there are no differences in the conditions of the classes which would justify the distinction made between them; therefore for this reason it is contended that the statutes are obnoxious to the fourteenth amendement to the Constitution.

That the statutes in these respects are constitutional has, in effect, been admitted by the courts of this State in the following cases: Anheuser-Busch Brewing Ass'n *vs.* Houck, 27 S. W., 696; same case in 30 S. W., 869; Texas Brewing Co. *vs.* Templeman, 38 S. W., 27; Fuqua *vs.* Brewing Co., 38 S. W., 29.

We might be content in resting a disposition of this question upon these cases, but the gravity of the question and the earnestness with which the law is assailed commands a more extended consideration of the subject. Of the many additional cases which may be cited, which by analogy sustain those noticed, are Fidelity & Casualty Co. *vs.* Allibone, 90 Tex., 660; Phœnix Ins. Co. *vs.* Levy, 33 S. W., 992; Campbell *vs.* Cook, 86 Texas, 634; R'y Co. *vs.* Mackey, 127 U. S., 209; R'y Co. *vs.* Beckwith, 129 U. S., 29; R'y Co. *vs.* New York, 165 U. S., 633; Pacific Express Co. *vs.* Seibert, 142
267 U. S., 353; R'y Co. *vs.* Hume, 115 U. S., 519; Sam Hing *vs.* Crowley, 113 U. S., 708; Barbier *vs.* Connolly, 113 U. S., 31; Crowley *vs.* Christensen, 137 U. S., 89; Hays *vs.* Minnis, 120 U. S., 68; Merchants' Bank *vs.* Penn, 167 U. S., 462; R'y Co. *vs.* Mathews, 165 U. S., 23; Powell *vs.* Penn, 127 U. S., 687; State *vs.* Moore, 17 Am. St. Rep., 697 (S. C., 104 N. C., 714).

In discussing the great mass of case law which touches upon this subject, those that relate to railways as a class of carriers are sufficient as a basis for demonstrating our views. It is true that many of these cases which recognize the right of the legislature to classify railways as a special subject of legislation and impose duties, burdens, and restrictions upon them which are not imposed upon other carriers are based upon the principle that they are public corporations and engaged in a public business, and that, further, on account of the dangerous character of their business and by reason of benefits received, the power exists to impose duties and burdens upon them which are not applied to other carriers; but, really, the true principle and doctrine upon which legislation of this character is bottomed, as affecting railways as a class, is that the public interests and welfare require that in the use of their property and the performance of their business it be conducted in a way least harmful to the public and most beneficial thereto, consistent with the right of ownership in the property. It is the public interest and welfare that is involved in the business they carry on and conduct that really gives the State in the exercise of its police power juris-

diction over their affairs. Now, the general welfare of the people is no more important to be observed in restraining and controlling railways in their relation to the commerce of the country than is the public interests to be subserved by laws which restrain and prevent trusts and combinations concerning such commerce and which seek to prevent conspiracies entered into for the purpose of affecting the prices of commodities which are useful and necessary to the enjoyment of life. In each case the interest of mankind
268 requires that the selfishness of human nature, which seeks alone to advance its individual interests, shall in the use of property and in conduct be so far restrained as may be compatible with individual right and liberty as will prevent harm and injury to the public.

The cases of Campbell *vs.* Cook, R'y Co. *vs.* Mackey, R'y Co. *vs.* Mathews, and R'y Co. *vs.* Beckwith, *supra*, are instances of legislation creating and enforcing regulations concerning only railways as a class of carriers. They were not applied to other carriers; but the statutes operated with equal effect upon all railways.

In these cases the rule laid down in Barbier *vs.* Connolly, 113 U. S., 31, was applied to the effect that "regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon one, but to promote with as little individual inconvenience as possible the general good; though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The views of the courts in these and similar cases *is* fully illustrated by what is said in R'y Co. *vs.* Mackey, 127 U. S., 205, where a statute making railway corporations liable for damages resulting to employees by reason of the negligence of their fellow servants was held constitutional: "The hazardous character of the business of operating railways would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public. The
269 business of other corporations is not subject to similar dangers to their employés and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are without discrimination made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to the carriers by canal and stage coaches and to other persons and corporations using steam in manufactories."

The legislature, in the pursuit of its police power, in selecting subjects upon which it shall bear, cannot capriciously and arbitrarily classify those subjects and impose burdens on some and relieve

others, when, in the nature of things, they are similarly situated and no reason could exist for the distinction. But, viewing the subject of classification from any standpoint, if reasons for the distinction can in any event exist, the legislation must be credited with being founded upon it. Doubtless, the several legislatures in passing statutes regulating railways as a distinct class of carriers evidently contemplated that from the magnitude of the service in which they were engaged and the relations they bore to the public and the injury that might result to the public welfare if they were not restrained required rules and regulations for their conduct which were not necessary to be applied to other carriers, because of their limited capacity and extent the public were not so much concerned with the conduct of their business, and that they were not so situated as to seriously in these particulars affect or injure the public. It is not the duty of the State to discover the reasons and circumstances upon which these laws may rest, but the burden is upon the appellant to demonstrate that the classification was capricious and unauthorized

We cannot say that the law upon its face establishes its want of reason, or that circumstances and conditions existing in this State in relation to the subjects dealt with in the acts and the
270 evils sought to be suppressed did not authorize the classification made in the statutes. This view might relieve us of any duty looking towards a discovery of reasons which might have been in the legislative mind for the distinction and classification. The law is not palpably in violation of the fourteenth amendment of the Constitution, but whether it is so depends much upon the facts and conditions existing at the time which would make it unjust to discriminate between the classes. In the absence of such facts showing the contrary, the presumption would be in favor of its constitutionality. State *vs.* Moore, 17 Am. St. Reps., 698; State *vs.* Addington, 77 Mo., 117; Powell *vs.* Pennsylvania, 127 U. S., 685.

The domestic welfare of the people of this State is within the keeping of its legislatures, and they are supposed to best know their wants and necessities, and the policy that shall govern its internal affairs, and the remedies needful in the pursuit of this policy, and that are necessary in order to extinguish or prevent evil and harmful conditions affecting the general interest and the public welfare. These are matters political and relate to the economic affairs of government, and are peculiarly within the knowledge of the law-making department thereof. The remedies therefore lie within the legislative province, and are, to some extent, confided to their discretion and wisdom. Hennington *vs.* Georgia, 163 U. S., 304; Powell *vs.* Pennsylvania, 127 U. S., 684. In this last case it is said, "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

In the pursuit of this policy conditions might exist which would justify the legislature in creating and providing remedies adequate to suppress the evil when applied to one class of subjects which

might not, in their opinion, be necessary to be applied to other classes, for the danger to the public welfare from the pursuit of the evil by the one class may be of such a magnitude and
271 lead to such disastrous consequences that corrective measures are absolutely essential to the order of good government and to the repose and stability of society, while, upon the other hand, the danger in these respects from the excluded classes may be inappreciable, and the acts denounced so difficult of consummation at their hands in injurious effects upon the welfare of the people that corrective measures are not necessary to be applied to them. Now, combinations and trust-, in restraint of trade and the existence of monopolies which placed it within the power of those combining to affect and elevate the prices of commodities in use by the peoples of the world for their enjoyment and necessities are harmful to the welfare of the public whenever and wherever such conditions are permitted to exist. With a knowledge of this fact within the mind of the law-makers, the legislature of this State, in the light of history, and with a knowledge of current events, may, with much reason, have concluded that the danger from trusts and combinations, which in their operation would injuriously affect the people, would be at the hands of the buyer and seller and dealer in commodities and not at the hands of the producer, and that by reason of the generally admitted necessities of the producers to readily and speedily dispose of their products and the difficulties in their way to a successful combination relating to the disposition of his products that little, if any, danger to the public could be apprehended from that source. The legislatures of the State are supposed to have acted in this matter intelligently and with a knowledge of the conditions and dangers confronting the people from combinations and trusts, and it requires little enlightenment to discover that at the time these laws were passed and now the disturbing classes, which were and now are so injuriously affecting the public welfare, are the buyers, sellers, and dealers in the articles in use by the people of this State. The unbridled license of these classes which, in many instances was exercised, had, within this State as well
272 as other sections of the country, assumed such proportions that the danger to the welfare of the people was so apparent that the layman as well as the law-giver could discern it.

Whatever conditions may exist elsewhere concerning the conduct of the producing class in affecting through combinations the prices of their productions, it cannot be said to exist in this State, if at all, to any appreciable extent—at least, not to such an extent as to be an evil of such proportions as to necessarily require corrective measures for its suppression. All these facts were known to the legislature and evidently influenced them in selecting the subjects to which the law should apply. Plessy *vs.* Furgeson, 163 U. S., 550. And, as said in Railway Co. *vs.* Mackey, *supra*, "it was simply a matter of legislative discretion whether the same liabilities" should be applied to the classes which were exempted from the operation of the statute. This case is quoted with approval by the recent case of Railway Co. *vs.* Mathews, 165 U. S., 25.

The conditions of the classes embraced in the act and those excluded are not altogether similar, and there are many distinguishing features between the two which suggest the power in the one to successfully combine and which deny it to the other. The infant twenty years of age may possess the mental requisites to contract as one *sui juris* and may as well understand the responsibilities of citizenship and as capable of intelligently exercising the functions of office and the duties of a citizen as an adult. The adult female often possesses as much intelligence as man and appreciates the rights and duties of citizenship and possesses a knowledge of the affairs of government, but in these instances a distinction is observed between their rights, on the one hand, and those of adults and males, on the other; but in those cases the power of the law-makers to confer privileges upon the one class and deny it to the other has never been successfully questioned, but they are
273 as much within the protection of the fourteenth amendment to the Constitution as those of other classes. It is somewhat difficult to perceive why mechanics as a class of laborers should be entitled to more privileges and advantages than are conferred upon other classes of laborers and servants; but laws of this class which provide means for mechanics in the collection of their debts are not extended to other classes of laborers, and, as said in Railway Co. *vs.* Mackey, such statutes are not obnoxious to the fourteenth amendment.

These are simply haphazard illustrations that have just occurred to us of many that could be given showing the power of the law-makers to classify subjects when in their wisdom and discretion reasons therefor may be suggested to them which, when viewed from the standpoint of some other body of law-makers or of some court which may be called to pass upon such statutes, may not be fully understood or appreciated.

The learned counsel for appellant, in their most able presentation of this question in their brief, contend that the views here expressed are opposed to the case of Railway Co. *vs.* Ellis, 165 U. S., 150.

That case does not conflict with the views we entertain upon this subject. It is distinguishable upon the ground that there it was held that the legislature did not have the power to arbitrarily and capriciously, without reason, distinguish between classes similarly situated. We do not oppose this view, but hold, as we have endeavored to show, that the classification made by the law in question was not of the character denounced in the case cited.

If the clause in the act of 1895 which exempts from its operation labor organizations for the purpose of maintaining their wages would render that statute obnoxious to the fourteenth amendment to the Constitution—which we do not think to be the case—the entire act would be void and could not operate as a repeal of
274 the former law of 1889; and so that if it should be determined that this latter act was unconstitutional, the former act would be in force and would not be subject to the objections urged against it, for the reasons stated by us in passing upon these objections, and therefore the State could maintain a case under this act.

In response to the first proposition urged under the fourth, eighteenth, twenty-sixth, and forty-second assignments of errors, it is sufficient to say that the petition went further than simply charging the appellant with transporting and shipping into Texas its oils, but in effect charged that it was engaged in business in Texas in disposing of oils, and had made and entered into contracts and agreements with various merchants within this State and others dealing in oils to buy and sell the oils of the defendant exclusively, and further agreed not to sell the oils so bought from the defendant company to any one buying from or dealing with any other corporations or persons dealing in competitive oils. These allegations in effect allege that the appellant was actually engaged in business within this State and had made and entered into such contracts with reference to the handling, disposition, and sale of oil in this State with merchants and local dealers of the character denounced in the case of Fuqua *vs.* Pabst Brewing Co., 38 S. W. Rep., 29.

In response to the second proposition under these assignments, it can be said that it does not conclusively appear that all of the transactions testified about by the witnesses occurring between the appellant and certain merchants at Brownsville, Texas, related solely to interstate commerce. There were some facts testified about by these witnesses which made it proper for the jury to consider what was the nature and effect of the transactions that occurred at Brownsville. It would have been improper for the court to have given the charge requested by the appellant upon this subject. Where there is any evidence, however slight it may be, the court must leave it to the consideration of the jury.

275 The court, in rendering its judgment in cancelling and forfeiting the permit of the appellant, provided that it should not relate to and interfere with the right of appellant in dealing in matters of interstate commerce. The appellant, in its third proposition under these assignments, complains of this judgment because, as the statute provides for a forfeiture of the permit, the court had no power to render judgment forfeiting the permit so as to apply to dealing in oils locally within this State. The contention is that, as the statute required a forfeiture of the permit to do business in all respects, *that* the court had no power to limit that right in its judgment.

It was decided, in the case of Fuqua *vs.* Pabst Brewing Co., *supra*, that it was not the purpose of these statutes to undertake in any way to regulate or to prohibit transactions of interstate commerce, and it was clearly proper for the court to give to the statute this application. If the statute could be applied to domestic commerce and transactions occurring within the limits of this State, the court could give it application, and its inability to extend it to matters of interstate commerce would not affect its power in this respect.

It is contended in the eighth assignment of error that it was not competent for the State to impair the contract authorizing the appellant to do business in this State. After the act of 1889 went into effect, the State granted to appellant authority to engage in its business within this State for a period of ten years. The act of 1889,

as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. Except where the foreign corporation is in the employ of the Federal Government or is engaged strictly in matters of interstate commerce, such bodies are entitled to no rights or privileges except which may be conferred upon them as an act of grace by the State. Pembina Mining Co. *vs.* Penn, 125 U. S., 183.

276 The laws of the State which apply to domestic corporations and individuals in prohibiting certain conduct applies with equal force to foreign corporations. The State in granting the privilege to do business does not absolve them from responsibility and contract to relieve them from the operation of laws which expressly apply to them. The act in force when the appellant entered this State informed it that for a violation of its terms the permit to do business here would be forfeited. This provision of the law was as much a part of obligation and as binding upon the appellant as if it had been expressly made a part of the permit. But there is another ground upon which this question may rest. The police power of the State cannot be bartered away, and there exists no contractual rights which are not subject to its exercise. Speaking of police powers, Judge Cooley, in his work on Constitutional Limitations, sec. 707, says: "The occasion to consider this subject in its bearing upon the clause of the Constitution of the United States which forbids the States from passing any laws impairing the obligation of contracts has been frequent and varied, and it has been held without dissent that this clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed expedient. All contracts and all rights are subject to this power, and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well being of the community may require or as circumstances may change, or as experience may demonstrate the necessity." Mugler *vs.* Kansas, 123 U. S., 669. And this principle is applicable to charters of corporations. Cooley, Const. Lim., sec. 709; R'y Co. *vs.* Mathews, 165 U. S., 18–25.

277 We cannot agree with the appellant that it could not become bound by the acts of its agents performed in this State within the scope of their duty, because the conduct complained of, for which the State is seeking to make it responsible for the acts of its agents, involves a criminal responsibility in addition to their civil liability, and does not interpose any objection to the application of the principles of the law of agency, which would make the appellant responsible to the State for a violation and infraction of its laws, which it was guilty of, through its agents, while performing their duty with reference to the business confided to them. Meacham on Agency, secs. 745 and 746; George *vs.* Gabey, 128 Mass., 289. The charge of the court on the subject of agency

was correct. It did not trench upon the province of the jury and stated what we understood to be the correct rule upon that subject.

In reply to the 24th and 25th assignments of error, we think there was testimony authorizing the instructions given by the court complained of. There is evidence which tends to show that such combinations and agreements were entered into as were violative of the spirit and meaning of the anti-trust statutes, and the evidence shows that these agreements were entered into by appellant through its agents, and there is some testimony which tends to connect the appellant with this conduct—that it knew of it. The fact that reports were made to it by these agents tends to establish that it had knowledge of these contracts and the violation of the law in the respect complained of by the State, and that it accepted the fruits and benefits of these agreements.

The evidence complained of in the 22nd, 27th, 28th, 29th, 30th, 32nd, 33rd, and 35th assignments of errors was admissible, controlled, as it was, by the charge of the court, which is also complained of. It tended to show, as a circumstance bearing upon the main issues in the case, the method of doing business in this State by the appellant. One principal reason why this testimony
278 was admitted was for the purpose of showing that the appellant had knowledge of the transactions complained of by the State that had some bearing and relation to that question. They were transacted by the trusted agents of the appellant, and we cannot assume that the appellant did not have notice of this conduct; but, as said before, there are some facts which tend to indicate that it did have notice and received the benefits of the transactions and agreements entered into by the agents with the local merchants of this State.

The court did not err in admitting the testimony of witness Dugger, nor did it err in refusing to admit the evidence of witness Grice, as complained of in the 31st and 36th assignments of errors, nor did it err in refusing to admit the testimony of witness Pierce, as set out in the 28th assignment of error, nor did it err in the ruling complained of in the 39th assignment of error.

No extended discussion is required upon the rulings complained of by these assignments, and it is sufficient to say that we have given them the consideration which their importance demands, and we reach the conclusion announced.

It is further contended, although the question is not properly raised, that the appellant was entitled to a charge to the effect that the jury must find in its favor unless its guilt of the conduct complained of was established beyond a reasonable doubt. Whatever may be the rule that exists in other jurisdictions, we do not think a charge of that nature would have been applicable in this case. This is a civil controversy, and, as has been previously said by this court in an opinion in which a number of cases were cited, "In no controversy of a civil nature would it be proper for the courts of this State to give such a charge." Pace *vs.* Mortgage Co., 43 S. W., 36.

We find no error in the record, and the judgment is affirmed.

Affirmed.

FISHER,
Chief Justice.

279 (Endorsed:) No. 1974. Waters-Pierce Oil Company *vs.* The State of Texas. Appeal from Travis county. Opinion. Affirmed. Fisher, chief justice. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, March 9, 1898. R. H. Connerly, clerk.

Judgment of Court of Civil Appeals.

Rendered March 9th, 1898.

WATERS-PIERCE OIL CO. *vs.* THE STATE OF TEXAS. } No. 1974.

Appeal from district court of Travis county.

Opinion by Chief Justice Fisher.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed; that the appellee, The State of Texas; E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, do have and recover of and from the appellant, The Waters-Pierce Oil Company, principal, and its sureties, J. G. Palm, Geo. Clark, and Wm. B. Abadie, all costs in this behalf expended, and this decision be certified below for observance.

280 *Motion for Rehearing.*

Filed March 18th, 1898.

In the Court of Civil Appeals, Third Supreme Judicial District, at Austin.

WATERS-PIERCE OIL COMPANY *vs.* THE STATE OF TEXAS. } No. 1974.

Appeal from Travis county.

In the above numbered and entitled cause comes the appellant, The Waters-Pierce Oil Company, after judgment of affirmance by this court, and here now moves the court for a rehearing of said cause, and that said judgment of affirmance be set aside and held for naught for the following reasons, to wit:

I.

The court in its opinion and judgment herein erred in holding that the acts of March 30th, 1889, and April 30th, 1895, commonly known as the anti-trust acts, were not violative of the Constitution

of the United States. Said acts are in conflict with the Federal Constitution, as set up and pleaded by appellant in the court below, both by demurrer and otherwise, because:

1. Said acts expressly discriminate in their operation and effect between persons and classes, and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, and professional men for acts which they expressly authorize farmers and stock-raisers
281 to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and expressly violative of the 14th amendment to the Constitution of the United States.

2. Said acts do not, as urged by the court in its opinion, exempt certain classes of citizenship from their operation, but they exempt certain classes of property, the annual earnings of the farmer and stock-raiser, from denunciation while such earnings remain in the hands of the original producer and raiser; and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock-raisers, under a certain state of circumstances, from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock-raisers are not treated alike, even with reference to their annual earnings. There is, therefore, an absence of that classification upon which the court reposes for the justification of its ruling as laid down in the Mackey case (127 U. S., 209).

3. Said acts deprive many citizens and persons of their liberty and property without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and they take from many persons and citizens their rights of property by mere statutory enactment without due condemnation according to the law of the land.

4. In defiance of the Federal Constitution these statutes assume to deny to every foreign corporation the right to do any business in Texas, interstate or otherwise, and to extend the authority and jurisdiction of the State beyond her territorial limits, thereby usurping and invading the jurisdiction, not only of the General Government, but of all the States of the American Union.

In support of these propositions we do not care to weary the court with a useless citation and repetition of authorities,
282 and content ourselves with citing the court again to the authorities cited in brief of appellant, pages 76 and 77, as to the first and second propositions, and to page 83 of said brief for authorities in support of the third proposition, and to pages 95 and 96 of said brief for authorities in support of the fourth proposition.

Argument.

Nor is it our purpose to submit to the court an extended argument upon these propositions, as the same were, by the courtesy of this court, elaborately argued orally at the hearing, and also in

briefs and arguments heretofore submitted by appellant. We, however, desire briefly to call the attention of the court to some errors into which we submit the court has fallen in its opinion discussing the points here raised. The court devotes a large portion of its opinion to a discussion of the doctrine of the police power of the State of Texas, which doctrine has never been contested by appellant in this case and is freely conceded. The police power of the State is of extensive range and authority, and under this police power the State may prescribe rules and regulations for the protection of the peace, health, good order, and general interests of the State, to any extent deemed wise by the legislative authority. But the court forgets a most important qualification of this doctrine, which qualification is as well established as the doctrine itself. The little word "if" cuts a most important figure in this as it does in many other questions of governmental and personal action. The State, through its legislative department, may prescribe any rule or regulation deemed by it necessary or promotive of the health, morals, good order, and prosperity of the State and the protection of its people, *if* such legislation does not conflict with the restraints and limitations imposed by the Federal Constitution. Whenever a police regulation, no matter how wise or beneficent it may be deemed by the State authority, comes in conflict with an
283 express provision of the Constitution of the United States, the police power of the State, as manifested in such legislation, becomes impotent and the legislation must give way.

Railway Company *vs.* Hefley, 158 U. S., 104.
New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650.
Leisy *vs.* Hardin, 135 U. S., 100.
County of Mobile *vs.* Kimball, 102 U. S., 691.
Brown *vs.* Houston, 114 U. S., 622.
Railway *vs.* Illinois, 118 U. S., 557.
Henderson *vs.* The Mayor, &c., of New York, 92 U. S., 257.
Railroad Company *vs.* Husen, 95 U. S., 465.
Walling *vs.* Michigan, 116 U. S., 446.

This court in its opinion, quoting from Barbier *vs.* Connolly (113 U. S., 31), lays down the principle upon which appellant relies. This principle is as follows:

"Regulations for these purposes may press with more or less weight upon one than another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment" (Opinion, pp. 20, 21).

That is our contention in this case. These laws do not operate

alike upon all persons and property under the same circumstances and conditions; they discriminate against some and favor others; they do not affect alike all persons similarly situated, and therefore the principle quoted and announced by this court does not
284 support the conclusion arrived at by the court. Let us make this plain. What is exempt from the operation of these laws? Not the farmers and stock-raisers, because, as we will show directly, some of these are not exempt. It is the annual earnings arising from the labor and enterprise and energy of the stock-raiser and the farmer. As shown by the published reports of the department of agriculture, insurance, statistics, and history of the State for 1894, this property amounts annually to more than one hundred and twenty millions of dollars, without estimating the cattle raised in the State, and this constitutes about the annual income of the State derived by the people from their labor and industry for the year. What right has the State to favor this class of property and incidentally favor some persons who may be the original producers and stock-raisers and yet denounce in the same statute the earnings of all other classes, which likewise constitute their property? Can it be said that the annual earnings of the farmer *is* entitled to special protection for the benefit of the original producer and raiser, and the property which represents the earnings of the shoemaker or of the mechanic or of the professional man is not entitled to the same guarantees of protection? In other words, is it equality under the law when the farmer and stock-raiser are expressly authorized to combine for the purpose of raising the prices of the products of their labor to any possible extent, and yet of the shoemaker or the mechanic or the professional man attempts to make any sort of combination with reference to the annual products of their labor they are subject to indictment and punishment for felony. This state of facts cannot be avoided, because such is the plain, unmistakable meaning of the law, and courts in passing upon the question are confronted with these dissimilarities. Is not the distinction made by the statutes purely arbitrary? Is there any reason for such distinction? Are not the earnings of the shoemaker and of the mechanic and of the professional man entitled to
285 equal protection with those of the farmer and stock-raiser? As a matter of fact, is not the mechanic entitled, if anything, to more consideration than the farmer and stock-raiser? It occurs to us that these are pertinent suggestions which the court cannot answer in a general way, as laid down in its opinion. General principles count for nothing when we come to the application of positive facts.

The court even concedes in its opinion (p. 21) that the legislature, in the exercise of its police power in selecting subjects upon which it shall bear, cannot capriciously and arbitrarily classify those subjects and impose burdens on some and relieve others, when, in the nature of things, they are similarly situated, and no reason could exist for the distinction. This is undoubtedly sound, and, we submit, is undoubtedly applicable to the case at bar. The mere assumption that farmers and stock-raisers cannot combine, even though

permitted by law to do so, is no answer to the argument. If they could not combine, although permitted, why exempt them? The classification here, if it approaches the dignity of classification, is purely capricious and arbitrary. The State proceeds to denounce certain acts as felonies, with a view evidently at the outset of making such denunciation general and applicable to the entire citizenship of the State, and then by almost the stroke of a pen at the conclusion of the statutes exempts about eighty per cent. of the citizenship from the pains and penalties prescribed by the act, leaving the remaining twenty per cent. to bear the burdens. As said in the Ellis case (165 U. S., 150), mere classification would not relieve the statute of infirmity when tested by the fourteenth amendment. The classification itself must not be arbitrary, but must be founded upon reason. This court says (Opinion, p. 22):

"We cannot say that the law upon its face establishes its want of reason or that circumstances and conditions existing in this State in relation to the subjects dealt with in the acts and in the evils sought to be suppressed did not authorize the classification made in the statutes. This view might relieve us of any duty looking
286 towards a discovery of reasons which might have been in the legislative mind for the distinction and classification. The law is not palpably in violation of the fourteenth amendment to the Constitution, but whether it is depends much upon the facts and conditions existing at the time, which would make it unjust to discriminate between the classes. In the absence of such facts showing the contrary, the presumption would be in favor of its constitutionality."

We regret that we cannot agree with the court either in its premises or in its conclusion as set forth in this paragraph. The principle thus announced by the court, and upon which it seems to rely, is in direct opposition to established principles as laid down by the Supreme Court of the United States. That court holds that the purposes of a statute must be determined by its natural and reasonable effect, regardless of its language.

Henderson *vs.* The Mayor, &c., 92 U. S., 268.
Yick Wo *vs.* Hopkins, 118 U. S., 373.

Looking, then, to the natural and reasonable effect of these statutes, their purpose is easily determinable. Every law must carry upon its face the reason for the law, at least to the extent of its conformation to the Constitution of the United States and, we may say, of the State of Texas. Ordinarily it would be a difficult matter to test the constitutionality of a law upon an issue of fact as to whether the circumstances and conditions existed within the domain of the State which would establish its want of reason or the reverse. We might say the task would be impossible ordinarily, but in this case the record contains enough to show the utter want of reason for the exemption. By reference to the record, pages 257, 258, this court will find the statement from the Census Office at Washington which shows that by the census of 1890 there were in Texas 470,049 farm-

ers, planters, agricultural laborers, stock-raisers, laborers, &c.

287 All courts are charged with judicial knowledge of the public vote at public elections, and this court knows that we only have in Texas about 540,000 voters. The calculation is an easy matter of subtraction. Out of this 540,000, 470,049 are exempt from the operations of this act and authorized to combine at pleasure with reference to their property, while the pains and penalties of felony are visited upon the remaining 70,000, consisting of all classes of people other than farmers, stock-raisers, and laborers. It is true this evidence was excluded from the jury by the ruling of the court below, and this ruling has been sustained by this court. But it is submitted that this exclusion is immaterial in view of the law which requires courts to take judicial notice and knowledge of the facts shown by the regular United States census.

See Kaltrier *vs.* Leonard, 34 Ind., 497.
Stultz *vs.* The State, 65 Ind., 492.
People *vs.* Williams, 64 Cal., 87.
Worcester Bank *vs.* Cheney, 94 Ill., 430.

So, if the court insists that the onus rests upon appellant to show a want of reason in the statute, we submit that these facts shown by the Census report suffice in an eminent degree for such establishment, and with judicial knowledge of these facts there is no room for presumption as to the constitutionality of the act, because presumptions are only indulged in the absence of facts, and not against facts. It may be true that every possible presumption is in favor of the validity of the statute, and that this continues until the contrary is shown beyond a rational doubt, but even this hard rule is fully met by these laws and these facts, and it occurs to counsel for appellant that there is no escape from the conclusion that these laws do discriminate against citizens and persons and do deny to many persons and citizens, both in and out of this State, that equal protection which is demanded by the fourteenth amendment.

288 We have already stated that the laws do not apply to classes, and that there is no classification, except indirectly. In this, we submit, we are correct. What protection does the laborer have upon the farm who raises crops for money wages? He is not an original producer, and yet he is a farmer. He is subject to the penalty if he takes his pay at the end of a year in agricultural products instead of money for his wages, for in that event he would still not be the original producer, although his sweat and muscle brought the property into existence. The original producer in that event would be the land-owner and farmer who hired his help. The herdsman who tends the flocks of cattle or sheep through the wintry storms for fixed wages would not be protected by the law, because he is merely a hireling, and the original raiser is the owner of the flock or herd. At the end of the season, if the herdsman prefers to take his pay in live stock, which he himself has assisted in raising, instead of money, he is denied the right to combine for the purpose of enhancing the value of his property, while the owner of the flock has an unlimited power and privilege

of combination. Are these classes treated alike under the same or similar conditions by these laws? We submit that these are pertinent questions, and that they do not admit of an answer by the quotation of general principles. Do they not illustrate, simple as they are, the fact that these laws carry upon their faces the want of reasonableness, which does not justify any such attempt at exemptions, or even classification, if we choose to dignify the purpose of it all with the terms "classification"? We submit that they do, and that they further demonstrate that the laws are palpably in violation of the fourteent- amendment to the Constitution. We therefore ask of this court a reconsideration upon this point.

5. We also submit that proposition 3, above set forth, is sound and correct, although in opposition to the views of the court. Said acts do deprive many citizens and persons of their liberty
289 and property without due process of law. They deprive many persons and citizens of the same right of liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and they take from many persons and citizens their rights of property, by mere statutory enactment, without due condemnation according to the law of the land.

In addition to the authorities cited in brief upon this proposition (Appellant's Brief, p. 83), we beg to add the following:

Parsons on Partnership, 3rd ed., p. 6.
3 Kent's Commentaries, p. 23.
1 Lindley on Partnership, 4th ed., p. 3.
U. S. *vs.* Trans-Missouri Freight Ass'n, 166 U. S., 290.
Allgeyer *vs.* Louisiana, 165 U. S., 578.

6. We submit, also, that the fourth proposition herein set out is correct, notwithstanding it is in antagonism to the conclusion of the court. These statutes assumed to deny to every foreign corporation a right to do business in Texas, interstate or otherwise, and they also assume to extend the authority and jurisdiction of the State of Texas beyond her territorial limits, thereby usurping and invading the jurisdiction not only of the General Government, but of all the States of the American Union.

In addition to the authorities cited on pages 92 and 93 of appellant's brief, we cite the following:

Story on Conflict of Laws, sec. 20.
McCulloch *vs.* Maryland, 4 Wheat., 316.
St. Louis *vs.* The Ferry Co., 11 Wall., 423.
Railroad *vs.* Jackson, 7 Wall., 262.
Slaughter-house cases, 16 Wall., 36.
U. S. *vs.* Reese, 92 U. S., 214, 221.
U. S. *vs.* Harris, 106 U. S., 629.
Trade-mark cases, 100 U. S., 82.
Baldwin *vs.* Franks, 120 U. S., 678.

290 The court in its opinion (p. 27) uses this language:

"The court, in rendering its judgment in cancelling and forfeiting the permit of the appellant, provided that it should not

relate to and interfere with the right of appellant in dealing in matters of interstate commerce. The appellant, in its third proposition under these assignments, complains of this judgment because, as the statute provides for a forfeiture of the permit, the court had no power to render judgment forfeiting the permit, so as to apply to dealing in oils locally within this State. The contention is that as the statute required a forfeiture of the permit to do business in all respects that the court had no power to limit that right, in its judgment."

And the court proceeds to refer to the case of Fuqua *vs.* Pabst Brewing Co., holding that it was not the purpose of these statutes to undertake in any way to regulate and prohibit the transaction of interstate commerce, and that it was clearly proper for the court below to give to the statute this application, saying further:

"If the statute could be applied to domestic commerce and transactions occurring within the limits of this State, the court could give it application, and its inability to extend it to matters of interstate commerce would not affect its power in this respect."

In this ruling this court is evidently in conflict again with the decisions of the Supreme Court of the United States. In U. S. *vs.* Reese, 92 U. S., 214, 221, that court holds as follows, in an opinion delivered by Chief Justice Waite:

"We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate on that which Congress may rightfully prohibit and punish. For this purpose we
291 must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts, but if it steps outside of its constitutional limitations and attempt that which is beyond its reach, the courts are authorized to and, when called upon in due course of legal proceedings, must annul its encroachments upon the reserved power of the States and the people."

This case is followed with approval in the following cases:

U. S. *vs.* Harris, 106 U. S., 629.
Trade-mark cases, 100 U. S., 82.
Baldwin *vs.* Franks, 120 U. S., 678.

It will thus be seen that in an analagous case the Supreme Court of the United States has held differently to the ruling of this court

and with due deference and respect to the opinion of this court we are prone to say that in our judgment the other court is correct. These statutes (section 4) emphatically and expressly assume to deny to every foreign corporation a right to do any business in Texas, interstate or otherwise. The language of this section is as follows:

"Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper
292 proceeding in the district court of Travis county in the name of the State of Texas."

Language could not well be more explicit. Here is a direct assumption that Texas has a right, for any cause deemed proper by her, to deny to any foreign corporation the right to do any business in Texas. The petition of the attorney general in behalf of the State in this case is based exclusively upon this statute and follows it literally. In the language of the Supreme Court of the United States, "Can the terms of this statute be limited by judicial construction so as to make it operate only on that which the State may rightfully prohibit and punish?" This court holds affirmatively that this can be done, and that it is competent for the district court of Travis county, notwithstanding this statute, to qualify its language and limit its terms to local business within the State, holding that this was the meaning of the legislature; yet the legislature did not say this; it said "any business," and the infirmity of the statute cannot be relieved by the courts, because the statute itself is an invasion of the prerogative of Congress and of the judicial department of the United States Government. In the Postal Telegraph Co. *vs.* Adams, 155 U. S., 697, the Supreme Court of the United States held that a State cannot prohibit a corporation of another State from doing business within the State. To the same effect is Leisy *vs.* Hardin, 135 U. S., 100, and other cases cited on pages 92 and 93 of appellant's brief. How, then, can the district court of Travis county legally qualify an enactment of the Texas legislature so as to make it conform to the Constitution of the United States? This section of the statute must be taken as it is, and not as we would have it or as the courts in Texas would have it. Most probably, if there should occur a necessity for the re-enactment of these statutes, this provision would appear in a qualified form. But this has not occurred as yet. The statute is mandatory, comprehensive, all-pervading, and *id* did not lie
293 with a court usually, nor does it lie with this court, to say that the legislature did not mean what it said. The infirmity is there upon the face of the statute and the statute must accept the consequences. It is beyond judicial relief by way of construction. The only remedy for its ills is a different enactment at the hands of the law-making power. The fourteenth amendment protects all citizens against State usurpation, and even this far-reaching amendment is not necessary to condemn in this kind of legislation. Long prior to its adoption the principle was established that no

State could by its laws directly affect or bind persons not resident in it, and that it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all States that one should be at liberty to regulate either persons or things not within its own territory. Between nations such conflicts of sovereignty can only be regulated by treaty or arms; but the Federal Constitution had failed in its design of forming a more perfect union if it had not provided against such encroachments upon State sovereignty. As said by Mr. Justice Swayne, in St. Louis *vs.* The Ferry Co., 11 Wall., 423:

"If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition in existence. Jurisdiction is as necessary to valid legislative as to valid judicial action."

II.

This court erred in holding that the court below did not err in overruling defendant's third demurrer based upon the defect of allegation in the petition which failed to negative that defendant corporation was doing an exclusive interstate business in Texas. All
294 that this court says upon this point (Opinion, pp. 26, 27) may be true and yet, if defendant company was doing only an interstate business in this State, the State had no jurisdiction, no matter what agreements it might have made with local dealers, as such acts would, in that event, be cognizable by Federal authority under the act of 1890. The petition failed to allege, even by inference, that defendant company was doing a local business in Texas—that is, was selling its oils in broken packages—and the demurrer having specially pointed out the defect, it was error to overrule same and is error in this court to sustain such ruling.

This court says in its opinion (p. 26) that it was a sufficient answer to the demurrer to say that the petition went further than simply charging appellant with transporting and shipping oils into Texas, but that in effect it charged that appellant was engaged in business in Texas and disposing of oils, and had made and entered into contracts and agreements with various merchants within this State and others dealing in oils to buy and sell the oils of the defendant company exclusively, and further agreed not to sell the oils so bought from the defendant company to any one buying from or dealing with any other corporation or person dealing in competitive oils, and that these allegations in effect alleged that the appellant was actually engaged in business within this State and had made and entered into such contracts with reference to the handling and disposition and sales of oils within this State with merchants and local dealers of the character denounced in the case of Fuqua *vs.* Pabst Brewing Co., 38 S. W. Rep., 29. We submit that all of this may be true, and yet it does not justify the action of the court below in over

ruling the demurrer. Suppose the appellant was engaged in business in Texas in disposing of its oils. This might have been interstate business, and presumably was, under the other allegations of the petition, which showed appellant to be a foreign corporation engaged in refining and shipping and selling oils in Texas; and suppose, further, that appellant did enter into contracts and
295 agreements with various merchants within this State and others dealing in oils to buy and sell the oils of defendant company exclusively. If the shipment were interstate commerce, impressed with that character under the law, the State was without jurisdiction so far as appellant was concerned, and the offense was a violation of the Sherman anti-trust act of 1890 and not a State law. Suppose, further, that merchants agreed not to sell the oil so bought from appellant to any one buying from or dealing with any other corporation or person dealing in competitive oils. If the transaction partook of the nature of interstate commerce, and the sales by appellant were in unbroken packages, and the contracts related to sales of oils in unbroken packages, as was presumably the case from the absence of proper allegations in the petition, then Texas was without jurisdiction for the same reason as stated above. Suppose, further, that these allegations in effect alleged that the appellant was actually engaged in business within this State and had made and entered into such contracts with reference to the handling, disposition, and sales of oils within this State with merchants and local dealers, yet if the transactions were interstate commerce exclusively, as was presumably the case from the allegations of the petition, the demurrer was well laid and ought to have been sustained. We take it for granted that there will be no question as to the effect of the law of interstate commerce. Even the judgment entered in this case, which this court approves, excepts all transactions of interstate commerce from its scope and effect and leaves appellant free to transact that character of business in any way it sees fit. The truth of the matter is, the judgment, by excepting appellant from the force and effect of the injunction and of the revocation of the permit, is a candid admission upon the part of the State, judicially had and done in open court by solemn act of the court, that the State could not concern itself in any manner with what appellant
296 might do in matters of interstate commerce. There is no allegation in the petition that appellant ever did one dollar's worth of local business in the State of Texas, or that it ever sold one dollar's worth of oil in broken packages. Hence the conclusion is inevitable that the demurrer was wrongfully overruled.

III.

This court has further erred in sustaining the ruling of the trial court in refusing to give to the jury special instruction No. 5, requested by appellant, in effect directing the jury to discard from their consideration the transactions proved to have occurred at Brownsville, because the evidence was uncontradicted that these transactions involved acts of interstate commerce alone (Opinion, p. 27).

The court holds that it did not conclusively appear that all of the transactions testified about by the witnesses occurring between appellant and certain merchants at Brownsville related solely to interstate commerce and adds that there was some facts testified about by these witnesses which made it proper for the jury to consider what was the nature and effect of the transactions that occurred at Brownsville. We have scanned the testimony in vain to find upon what evidence in the record the court obtains this ruling. We find nothing in the testimony of the Brownsville witnesses to take the transactions out of the operation of interstate commerce, and, on the contrary, we find the evidence of the division manager at Galveston, who had charge of the shipments to Brownsville, that every shipment to Brownsville was interstate commerce made in unbroken packages. We find also that every witness at Brownsville in speaking about the transactions testified to the sale to them of cases of oil, which cases, as shown by the record, consisted of two 5-gallon cans to each case. The court may be right in its conclusion as to the facts, but we have not been able to find any evidence
297 in the record justifying such conclusion; to the contrary, the evidence seems to us to be uncontradicted that the transactions at Brownsville were purely and simply all interstate transactions in that the goods were shipped by steamer from New York direct to Brownsville in cases and were sold by appellant at Brownsville in the original packages. We submit, therefore, that there was error in this ruling of the court, which ought to have justified the court in reversing the judgment.

IV.

The statutes of 1889 and 1895 (section 4) prescribe that for a violation of any provision of either statute by a foreign corporation it shall be denied the right to do any business in Texas, and that the attorney general should enforce this provision by injunction, &c. The judgment in this case finds the defendant company did violate some provisions of this statute, but still authorizes it to do some business in the State. This judgment is invalid in that it does not conform to the statute prescribing the forfeiture, and its attempted modification of the statute does *not* relieve its invalidity (Opinion, p. 27).

As we have already discussed this feature of the opinion and ruling of this court, it is not necessary to repeat the same, and we refer to what we have said in the foregoing with reference to the error apparent in this judgment.

V.

This court further erred in holding that the trial court did not err in giving charges numbers 11, 13, and 20, in effect instructing the jury that a corporation was liable for the acts of its agents done in the scope of their employment and agency, and that appellant was bound by the acts of its agents, if said agents were acting within the scope of their employment and agency, and that it was

not necessary for the State to establish such authority by positive or direct testimony, but the same might be shown by circum-
298 stances without any further instruction as to the force and nature of circumstantial testimony, all as set forth in appellant's 20th, 21st, and 23rd assignments of error (Appellant's Brief, pp. 100 *et seq.*).

These charges were applicable only in civil cases and not in suits involving penalties and forfeitures, which are necessarily penal in their nature. Appellant and its agents were charged in this action with violations of law, and the agents, if guilty, were guilty of felonies under the law. There can be no agency in crime, and a corporation cannot empower its agents to do a criminal act, nor can any presumption obtain that such authority was given. A criminal act cannot be done by an agent, even within the scope or purview of his employment, so as to bind the corporation by that fact alone. Other conditions must enter into consideration in order to fix liability on the corporation, all of which are set forth in instructions requested by appellant (R., pp. 93, 94, 95, 96, and 97), as substantially set forth in Appellant's Brief (pp. 102, 104); which instructions were refused by the court below.

The trial court proceeded upon the assumption that this was a civil case, and this opinion is confirmed by this court. Of course, in an ordinary civil controversy between parties the doctrine announced by the lower court and approved by this court is correct. A corporation is liable for the acts of its agents done within the apparent scope and purview of their agency and employment; but this was a different character of case. This case was penal in its nature, designed by way of prosecution to punish appellant for a violation of the laws of Texas. The penalty demanded by the State was a most severe one, involving, as the record shows, practically the loss of a permanent investment by way of facilities in handling its business in Texas amounting to a half million dollars. It involved also the right of appellant to do any business in this State. As the record discloses, its business had existed here
299 for twenty years or more, and by business accumen, industry, and energy it had secured within the limits of the State of Texas about six thousand merchant customers who dealt almost exclusively with appellant. The loss of its permanent investments and the loss of its annual business was a most serious penalty, and marked the case as one essentially different in its characteristics from an ordinary private controversy between parties. For this reason the appellant, both in the court below and in this court, urged upon both courts the law of agency, not as applicable to controversies between private parties, but as applicable to the particular suit in hand.

Thompson in his valuable work on Corporations lays down this principle:

"The governing principle here is that an officer, agent, or servant of a corporation who does an act forbidden by law is responsible for it in his person, since the corporation is presumed not to have given him any authority to do such an act. While in some cases

this principle may operate to shield the corporation from criminal responsibility, yet in others, as where the punishment is by pecuniary fine only, a corporation may be proceeded against jointly with the wrong-doing officer or agent" (section 4995).

This learned author lays down the further rule as follows:

"The general rule is that a corporate act or contract cannot be validated by ratification, either (1) where the act or contract was wholly in excess of the powers of the corporation, express or implied, or (2) where it was prohibited by positive law."

The court will bear in mind that these acts, which consisted of four or five isolated acts by local agents in unimportant towns and localities in Texas, constituted the basis of the finding of the jury and of the judgment of the court below, for in the progress of the trial the learned judge below withdrew from the consideration of the jury any testimony relating to the alleged combination between the Standard Oil trust and the Waters-Pierce Oil Company,
300 presumably upon the ground that there was not even sufficient evidence to justify his even submitting that issue to the jury. It was requisite, therefore, under the law, properly applied, that the governing body of a corporation should be affected with knowledge, acquiescence, or ratification of the acts of these local agents. (See authorities cited in Brief of Appellant, pp. 106, 107.)

As was said in an early Mississippi case with reference to forfeiture of bank charter because of violation of law, "the proof must show that the directors acquiesced in the wrongful acts of the cashier" (6 S. & M., 237, 238). An agent's authority, if capable of being executed in a lawful manner, is never to be extended by construction to impose acts prohibited by law so as to render the principal liable to a criminal action or to a statutory penalty (Boon on Corporation, sec. 132; 3 Duer, 241). The same principle has been recognized and applied by the supreme court of Texas with reference to the liability of corporation other than a common carrier for an injury resulting in death from the negligence of its agent or employé, holding that it is necessary in such case before the corporate liability attaches to show that the negligence was of the corporation itself and not of a local agent. The appellant requested instructions upon every phase of this question, all of which are set forth substantially in Brief of Appellant, pp. 102, 104. There was no direct proof that these isolated acts of local agents were ever brought to the knowledge of appellant and its governing body. To the contrary, the president, H. C. Pierce, and the secretary, J. P. Gruet, testified that they had never heard of them before the institution of these proceedings. This being the case, the law of agency as applied by the court was, in the judgment of counsel for appellant, altogether erroneous, and the instructions requested should have been given as the proper law of the case. We therefore ask the court to reconsider this question, especially in the light of decision of the supreme court in Franco-Texas Land Co. *vs.*
301 McCormick (85 Tex., 420), in which it is held that a corporation cannot empower an agent to do any act which may not

lawfully be done under its charter, while a private person may empower his agent to do any act not forbidden by law. Here the appellant was held by the judgment of the court to the act of three or four local agents done in violation of law and with positive testimony by the president and secretary of appellant that they had never heard of any such contracts being in existence until institution of prosecution. This being the condition of the record, appellant submits that this court is in error in holding that the usual charge which obtains in civil controversies between private persons, to the effect that a corporation is liable for the acts of its agent done within the scope and purview of his employment, was altogether inapplicable to the case, and that a much higher degree of evidence than the mere presumption which obtains from the acts of an agent done apparently within the scope and purview of his employment was requisite on behalf of the State before it could insist upon holding appellant liable in this prosecution.

VI.

This court further erred in sustaining the ruling of the court below in instructing the jury that the State need only establish by a preponderance of the evidence the facts necessary to entitle it to recover (R., 87), and in refusing to instruct the jury, as requested by appellant, that if upon all the evidence the jury should entertain a reasonable doubt as to the knowledge or participancy of the appellant with any unlawful acts of its agents, if any, then the jury would find for the appellant (R., 97).

The court dismisses this assignment of error with the remark that this is a civil controversy, and that the court below was right in its charge and correct in refusing to give the charge requested by appellant, stating further that the question was not properly raised. We are not clear as to the meaning of the court that the question was not properly raised. The court below gave the charge that the State was entitled to recover upon a mere preponderance of the evidence. The appellant requested an instruction upon the reasonable doubt, which was refused. If there was any other way to raise the question, counsel is not advised. Under the statute the charge stood excepted to, as did also the refusal to give the instruction requested.

302

Was this a civil case? And was appellant entitled to a charge as to the reasonable doubt? As said before, this action was penal and designed as much for punishment of appellant as if its individual members had been charged with felony. In truth and in fact it was an action against the agents as well, who, if the judgment was correct, were guilty of felony. This question has been elaborately considered by the Federal courts, and they hold that in cases involving forfeitures and penalties the court must charge as to the reasonable doubt and the Government must prevail, if at all, in the case, not by a preponderance of the evidence, but by the establishment

of the facts alleged either by way of indictment on information or in any other shape beyond a reasonable doubt.

See U. S. *vs.* Shapleigh, 54 Fed. Rep., 126.
U. S. *vs.* The Burdette, 9 Pet., 682.
Chaffee *vs.* U. S., 16 Wall., 516.
Boyd *vs.* U. S., 116 U. S., 616, 637.
Wisconsin *vs.* The Ins. Co., 127 U. S., 265.

One of these authorities is cited approvingly by the supreme court of Texas in R'y *vs.* Dwyer, 84 Texas, 194; at least such case recognizes these Federal decisions without disapproval. We commend especially to the court the learned opinion of the circuit court of appeals of St. Louis, composed of three very able judges, as delivered in the Shapleigh case, *supra*, and ask a careful reconsideration of this point, believing also that this court has
303 fallen into error in laying down a rule which may subject not only a corporation, but many citizens hereafter, to forfeiture of their rights and property by a preponderance of evidence totally unsatisfactory to averybody else except to a jury in a trust case.

VII.

The appellant shows to the court that M. M. Crane, Esq., attorney general of the State of Texas, and T. A. Fuller, Esq., assistant, both of whom reside at the city of Austin and State of Texas, are counsel for appelles in this cause. It therefore comes and prays the court for a rehearing of this cause, and that due notice, in accordance with the law, of this motion be served upon the said counsel for appellee or one of them, and that upon hearing of this motion it may please the court to set aside its order at a former day of this term affirming the judgment of this cause, and that the judgment of the court below may be reversed and the cause remanded for further proceedings.

JNO. D. JOHNSON,
GEO. CLARK,
D. C. BOLINGER,
Counsel for Appellant.

(Endorsed:) Mo. 548. Waters-Pierce Oil Co. *vs.* State of Texas. Motion for rehearing. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, March 18, 1898. R. H. Connerly, clerk. Overruled.

Order of Court of Civil Appeals Overruling Motion for a Rehearing, March 30th, 1898.

Motion 548.

WATERS-PIERCE OIL COMPANY *vs.* STATE OF TEXAS. } No. 1974. Appeal from Travis County.

Motion for a rehearing. The motion is overruled.

304 *Petition for Writ of Error.*

In the Court of Civil Appeals for the Third Supreme Judicial District.

THE WATERS-PIERCE OIL COMPANY
vs.
THE STATE OF TEXAS. } No. 1974.

Appeal from Travis county.

To the honorable the supreme court of the State of Texas:

Your petitioner, The Waters-Pierce Oil Company, a private corporation duly organized and incorporated under the laws of the State of Missouri, and which has its principal office and domicile at the city of St. Louis, in said State of Missouri, and which is the appellant in the above entitled and numbered cause, comes and files this its application for a writ of error in terms of law for the correction of many errors believed by petitioner to have been committed by the court of civil appeals of the third supreme judicial district in affirming the judgment of the district court of the 26th judicial district of the State, and here now petitioner shows as follows:

I.

This suit was instituted by the appellee, The State of Texas, against your petitioner in the district court of the 26th judicial district, at Austin, on February 6th, 1896, seeking of said court a judgment revoking the authority and permission of this petitioner as a foreign corporation to transact any business in the State of Texas, and to enjoin it, its agents, servants, and employés, from transacting any business in the State of Texas, because of an alleged violation by this petitioner of the anti-trust acts of 1889 and 1895. On
305 June 15th, 1897, a trial was had in said district court and judgment was rendered upon a verdict in favor of the State of Texas and against petitioner, The Waters-Pierce Oil Company, denying to petitioner the right to do any business in Texas and revoking and cancelling its permit theretofore granted to it as a foreign corporation to do business in Texas, and perpetually enjoining petitioner and its agents from doing business in Texas, but adding this proviso by way of qualification to said judgment:

"Nothing herein contained shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State."

Petitioner shows further that upon the rendition of said judgment it duly filed its motion for new trial and in arrest of judgment, which were thereafter overruled in said district court, and thereupon petitioner perfected its appeal to the court of civil appeals for the third supreme judicial district, and said court of civil appeals did on, to wit, the 9th day of March, 1898, enter its judgment and hand down its opinion containing its conclusions of law

and fact, in which said judgment said court affirmed the judgment of the district court of the 26th judicial district. Petitioner further shows that thereafter and within the time prescribed by law it, your petitioner, did file in said court of civil appeals for the third supreme judicial district, at Austin, its motion for rehearing, wherein it set up the various grounds and assignments hereinafter to be set forth, which motion for rehearing was overruled by said court of civil appeals on, to wit, the 30 day of March, A. D. 1898. Petitioner shows that the jurisdiction of this court is manifest from the record in that this is a case of forfeiture, and, as shown further by the record, involves very large interests, amounting in the aggregate to more than five hundred thousand dollars of invested property held and owned by petitioner in the State of Texas, as well as its business in said State, which involves transactions to the amount of more than one million dollars annually.

306 II.

First Assignment of Errors.

The court of civil appeals erred in its opinion and judgment rendered in this cause in holding that the acts of March 30, 1889, and April 30, 1895, commonly known as the anti-trust acts, were not violative of the Constitution of the United States. Said acts are in conflict with the Federal Constitution, as set up and pleaded by appellant in the court below, both by demurrer and otherwise, because:

1. Said acts expressly discriminate in their operation and effect between persons and classes and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, merchants, and professional men for acts which they expressly authorize farmers and stock-raisers to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and expressly violative of the fourteenth amendment to the Constitution of the United States.

2. Said acts do not, as urged by the court in its opinion, exempt certain classes of citizenship from their operation, but they exempt certain classes of property while in a certain condition, said property being the annual earnings of the farmer and stock-raiser while such earnings remain in the hands of the original producer and raiser; and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock-raisers, under a certain state of circumstances, from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock-raisers are not treated alike even with reference to their annual earnings. There is, therefore, an absence of that classification upon which the court reposes for the justification of its ruling as laid down in the Mackey case (127 U. S., 209).

307 3. Said acts deprive many citizens and persons of their liberty and property without due process of law. They de-

prive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs and earnings which they guarantee to other persons and citizens; and they take from many persons and citizens their rights of property by mere statutory enactment without due condemnation according to the law of the land.

4. In defiance of the Federal Constitution, these statutes assume to deny to every foreign corporation the right to do any business in Texas, interstate or otherwise, and to extend the authority and jurisdiction of the State beyond her territorial limits, thereby usurping and invading the jurisdiction, not only of the General Government, but of all the States of the American Union.

Authorities.

See list of authorities cited in Appellant's Brief, pp. 76, 77, and 83. See also authorities cited in appellant's motion for rehearing, pp. 10, 11.

Second Assignment of Error.

The court of civil appeals erred in affirming the judgment of the lower court because, under the statutes as passed by the legislature of the State of Texas, if any foreign corporation shall violate any of the provisions of said statute it is declared that they shall forfeit their right and permit to do any business in Texas, and the judgment of the lower court, after adjudging that petitioner should not be permitted to do any business in Texas, proceeded to qualify the judgment by authorizing petitioner to transact an interstate commerce business in this State; all of which was judicial legislation on the part of said courts violative of the statutes, and constituted error in law.

308 *Statement.*

This suit was brought to forfeit appellant's permit to do any business in Texas and to enjoin it from doing any business in said State (R., 1–42). The petition and prayer are based on section 4 of both acts, which in cases of violation provide that the corporation should be denied the right and prohibited from doing business within this State, and it should be the duty of the attorney general to enforce this provision by enjoining or other proper proceedings in the district court of Travis county in the name of the State of Texas. The judgment is in the usual form, which recites the verdict in favor of the State as against petitioner and adjudges a denial to petitioner of the right to do any business in Texas, revokes and cancels its permit to do business in Texas, and perpetually enjoins it and its agents from doing business in Texas, but added the provision hereinbefore recited, to wit, that "nothing herein contained shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State" (R., 73–75).

Authorities.

See authorities cited in Appellant's Brief, pp. 95, 96; also the following:

U. S. *vs.* Reese, 92 U. S., 214, 221.
U. S. *vs.* Harris, 106 U. S., 629.
Trade-mark cases, 100 U. S., 82.
Baldwin *vs.* Franks, 120 U. S., 678.

Particular attention is called to the language of Chief Justice Waite in U. S. *vs.* Reese, *supra*, which contains this language:

"We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which
309 is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would to some extent substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to and when called upon in due course of legal proceedings must annul its encroachments upon the reserved power of the States and the people."

And in Baldwin *vs.* Franks, *supra*, the court, speaking through Chief Justice Waite, used this language:

"In support of this argument reliance is had upon the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has
310 no parts within the meaning of the rule. * * * It provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens, those who conspire to deprive one of his rights under the laws of a State, and

those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

And in the Trade-mark cases, *supra*, the court, speaking through Mr. Justice Miller, used this language:

"It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases if no further. To this there are two objections—first, the indictments in these cases do not show that the trade marks which are wrongfully used were trade-marks used in that kind of commerce; secondly, while it may be true that when one part of a statute is valid and constitutional and another part is unconstitutional and void the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in U. S. *vs.* Reese, 92 U. S., 214. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at any election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress
311 could only punish such denial when it was on account of race, color, or previous condition of servitude.

"It was urged, however, that the general description of the offence included the more limited one, and that the section was valid where such was in fact the cause of denial; but the court said, through the Chief Justice: 'We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' If we should in the case before us undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely, make a trade-mark law which is only partial in its operation and which would complicate the rights which parties would hold in some instances under the act of Congress and in others under State law" (pp. 98, 99).

It occurs to counsel for petitioner that these authorities quoted

herein are so explicit as to leave the opinion of the court of civil appeals upon this question entirely unsupported. Here the court was asked not to separate parts of a statute which might be constitutional from other parts which were manifestly unconstitutional, but was asked, and assented to it, that the court had a right to qualify the statute; in other words, to introduce words of limitation into this penal statute so as to make it specific, and to limit it so as to make a new law and one which the legislature
312 never passed. As hinted by the court in the Trade-mark cases, we think we would hazard nothing in asserting that if this limitation engrafted upon this statute by the court below and the court of civil appeals had been before the legislature the statute would not have been passed, because it is manifest that such limitation renders the statute absolutely impotent. If the State cannot interfere with interstate commerce, which is the case and is not doubted—in fact, is conceded, not only by learned counsel for the State, but by the two courts, the court below and the court of civil appeals—why attempt to prohibit petitioner or any other corporation from doing a local business within the State? The remedy becomes ridiculous and simply involves a change of methods and of distribution on the part of petitioner or of any other corporation dealing in like commodities. All it would have to do would be to establish its agencies throughout the State and sell in unbroken cases altogether instead of its present methods, as disclosed by the record, which manifests a decided advantage to the people of the State in lower prices. By this method, which is an easy transition, it could do as much or more business in Texas than it is doing now, but yet at a greater expense to the people, because the facilities for distribution would not equal the methods as shown by the record are now in use in many parts of the State. In other words, the limitation imposed by the court practically destroys the statute, so far as an effective remedy is concerned; but whether this be so or not, and it is immaterial, the question is one of power in the courts to engraft a limitation upon a statute which the legislature failed to do. When this is done it must be done by the law-making power and not by the judicial power.

Third Assignment of Error.

The court of civil appeals erred in its opinion and conclusions in holding that the court below did not err in overruling defendants' third demurrer, based upon a defect of allegation in the
313 petition, which failed to negative that defendant corporation was doing an exclusive interstate business in Texas. All that the court of civil appeals says upon this point (Opinion, pp. 26, 27) may be true, and yet if defendant company was doing only an interstate business in Texas, the State had no jurisdiction, no matter what agreements it might have made with local dealers, as such acts would in that event be cognizable by Federal authority under the act of 1890. The petition failed to allege, even by inference, that defendant company was doing a local business in

Texas—that is, was selling its oils in broken packages—and the demurrer having specially pointed out the defect, it was error in the court below to overrule same, and it was error in the court of civil appeals to sustain such ruling.

Statement.

In addition to the statement contained in brief of appellant, and also in motion for rehearing, pages 15 to 17, we call the attention of this court to the allegations of the petition, which allege that the Waters-Pierce Oil Company was a Missouri corporation, and that the object and purpose of its incorporation was to buy and sell oils in the State of Missouri and other States (R., 2); that the Waters-Pierce Oil Company became a member of the Standard Oil trust in 1882, and the purpose of said trust was to monopolize the petroleum industry in the United States by refining, selling, and transporting oils in the several States of the United States (R., 19). The petition (R., 1–41) fails to allege anywhere that the Waters-Pierce Oil Company was transacting a local business in Texas. Petitioner, defendant below, demurred on this ground specially (R., 49, 50, 51, 52); in fact, submitted four or five special demurrers on this ground, which were overruled by the court (R., 73). It also filed its motion in arrest of judgment on the same ground, which was overruled (R., 112–115).

Authorities.

See authorities cited in Appellant's Brief, pp. 92, 93.

314 *Argument.*

The reasoning of the court of civil appeals (Opinion, p. 26 *et seq.*) is plausible, but fallacious. That court seem to say and hold that it was a sufficient answer to the demurrer to say that the petition went further than simply charging petitioner with transporting and shipping oils into Texas, but that in effect it charged that petitioner was engaged in business in Texas and disposing of oils and had made and entered into contracts and agreements with various merchants within this State and others dealing in oils to buy and sell the oils of petitioner exclusively, and further agree not to sell the oils so bought to any one buying from or dealing with competitors, and that the effect of these allegations was that petitioner was actually engaged in business within the State of Texas and had made and entered into such contracts with reference to the handling and disposition and sales of oils within this State. All this might be true, and yet it does not justify the action of the court below in overruling the demurrer. The allegations of the petitioner must, of course, be taken more strongly against the pleader and there can be no presumption in his favor to aid him. Petitioner might have been engaged in business in Texas in disposing of its oils, but it may have been interstate-commerce business, so far as the allegations of the petition show. If it was interstate-commerce business,

the State had no jurisdiction whatever over it, either criminally or civilly, and could not enforce a forfeiture. There is no excuse for the court below, because the defect in the pleading was specially pointed out by demurrer and called to the attention of the court. It ought to have been sustained and the plaintiff required to amend, and the overruling of this demurrer is manifest error.

Fourth Assignment of Error.

The court of civil appeals further erred in its opinion and judgment in sustaining the ruling of the trial court in refusing
315 to give to the jury special instruction No. 5, requested by appellant, which in effect directed the jury to discard from their consideration the transactions proved to have occurred at Brownsville, Texas, because the evidence was uncontradicted that these transactions involved acts of interstate commerce alone (Opinion, p. 27).

Statement.

See statement under second proposition, pp. 92, 93 of Appellant's Brief.

The only testimony introduced upon the trial as to the character of the sales made at Brownsville is the testimony of J. M. Kennan, and he testified that all the oil sold by petitioner at Brownsville for more than ten years past was in unbroken packages shipped there direct by steamer from New York (R., 249 *et seq.*). Upon this testimony petitioner requested the court below to direct the jury to discard from their consideration these Brownsville transactions, as they were interstate commerce, which the court refused to do (R., 96).

Authorities.

See Appellant's Brief, pp. 92, 93, for list of authorities, especially the following:

Postal Telegraph Co. *vs.* Adams, 155 U. S.
Leisy *vs.* Hardin, 135 U. S.

Fifth Assignment of Error.

The court of civil appeals erred in affirming the judgment and in holding that the trial court did not err in giving charges Nos. 11, 13, and 20, which in effect instructed the jury that a corporation was liable for acts of its agents done in the scope of their employment and agency, and that petitioner was bound by the acts of its agents if said agents were acting within the scope of their employment and agency, and that it was not necessary for the State to establish such authority by positive or direct testimony,
316 but the same might be shown by circumstances without any further instructions as to the force and nature of circumstantial testimony; all as set forth in appellant's 20th, 21st, and 23rd assignments of error (Appellant's Brief, pp. 100 *et seq.*).

Statement.

The court charged the jury as stated in the above assignment, substantially (R., 82, 83). Appellant requested a series of instructions to the contrary effect, as follows:

1. That the jury must not presume that appellant authorized or directed its agents to violate the laws in their dealings, and that a corporation was not responsible for every wrong done in its name, but the jury must find, if at all, that the agents acted through the procurement of a corporation or with its knowledge and assent (R., 92).

2. Petitioner also requested on the trial below an instruction to the effect that an agent's authority is not to be extended by construction to embrace acts prohibited by law so as to render the principal liable to a penalty of forfeiture. The proof must show that the principal either authorized the agent to make the unlawful act or that, having knowledge of such act, the principal connived at or acquiesced therein (R., 93).

3. That a corporation is not liable for the criminal acts of its agent, but in order to subject it to liability it must be shown that the corporation procured, authorized, or directed the agent in the act or knew of and assented to such violation of law before its commission, and that a principal could not by mere subsequent ratification of a crime committed by an agent subject himself to the penalty, nor could the corporation ratify a transaction of its agent when such transaction was prohibited by positive law (R., 94, 95).

All these charges were refused by the court, and the court of civil appeals approved the ruling of the court below in such refusal.

The court below also charged the jury, in its main charge, in
317 substance and effect that in determining whether or not the agents of petitioner were authorized to make the contracts alleged, if any were made, and whether the same were known to or acquiesced in by petitioner's governing officers it was not necessary that this should be shown by positive or direct testimony, but might be shown by circumstances, and that the jury would take into consideration all the facts and circumstances in evidence in determining the question (R., 86).

Authorities.

See list of authorities in Appellant's Brief, pp. 106, 107.

Argument.

There can be no agencies in crime and a corporation cannot empower its agents to do a criminal act, nor can any presumption obtain that such authority was given. A criminal act cannot be done by an agent, even within the scope or purview of his agency, so as to bind the corporation by that fact alone; other conditions must enter into consideration in order to fix liability on a corporation, all of which were set forth in the instructions requested by appellant (R., pp. 93, 94, 95, 96, 97). The trial court proceeded

upon the assumption that this was a civil case, and the court of civil appeals entertained, as shown by its opinion, the same view. This case, however, was penal in its nature (U. S. *vs.* Shapley, 54 F. R., 126; same case, 4th C. C. A., 237). The penalty demanded by the State was a severe one, involving practically the loss of a permanent investment as well as a large and lucrative business. The State could have proceeded by indictment of the corporation, and the fact that it selected the statutory remedy does not alter the nature of the case. Of course, if it was a civil case pure and simple between private litigants or between the State and a private party, seeking a recovery in money for a just debt or demand, the charges of the court below would have been proper and the charges
318 requested by petitioner would not have embodied the law of the case as applicable to this particular feature, but not being a civil case it was error for the court below to stop with the enunciation of the general doctrine applicable to civil cases that a principal was bound by the acts of his agent done within the scope and purview of his employment or agency. The nature of the case, the remedy sought, and the penalty prayed for rendered it essential that the court in its charge should lay down explicitly the law of agency governing the facts and not the general law of agency, and all the laws of agency and decisions bearing upon the point manifest the error of the court.

See 4th Thompson on Corporations, sections 4995 and 5288.

State *vs.* The Bank, 6 S. and M., 237, 238.

Boone on Corporations, section 132.

Clark *vs.* The Bank, 3 Duer, N. Y., 241; and a number of other cases cited in brief.

See also statement and argument in motion for rehearing on this point, pp. 19–23.

Sixth Assignment of Error.

The court of civil appeals further erred in sustaining the ruling of the court below in instructing the jury that the State in this case need only establish by a preponderance of the evidence the facts necessary to entitle it to recover (R., 87), and in refusing to instruct the jury, as requested by petitioner, that if upon all the evidence the jury should entertain a reasonable doubt as to the knowledge or participancy of the appellant with any unlawful acts of its agents, if any, then the jury would find for the appellant (R., 97).

Statement.

The court of civil appeals dismissed this assignment with the remark that the case was a civil case involving a civil con-
319 troversy, which it seemed to consider a full answer to the contention. It also held in its opinion that the question was not properly raised. The charge of the court was given as stated in this assignment, which, of course, stood excepted to under the statute. Petitioner asked a charge upon the reasonable doubt, which

was refused. If there was any other way to raise the question, counsel for petitioner is not advised.

Authorities.

U. S. *vs.* Shapleigh, 54 Fed. Rep., 126.
U. S. *vs.* The Burdette, 9 Peters, 682.
Chaffee *vs.* U. S., 18 Wall., 516.
Boyd *vs.* U. S., 116 U. S., 616, 637.
Wisconsin *vs.* The Ins. Co., 127 U. S., 265.
R'y *vs.* Dwyer, 84 Texas, 195.

Argument.

We commend these authorities to the careful scrutiny of this court, as they demonstrate indubitably not only the nature of the case as held by our most learned courts, but the absolute indispensability that the trial court should instruct the jury that in this class of cases the Government could not recover, no matter how it sued—whether in its own name or through an informer—unless the facts upon which it based its right to recover were established beyond a reasonable doubt.

Your petitioner, upon these assignments of error, all of which were presented in the court of civil appeals, both in brief and in the motion for rehearing, comes and prays the court that it may please this court to grant to your petitioner a writ of error in terms of law, whereby these errors, which are manifest of record and to the detriment of petitioner, may be reviewed and revised, and that the judgment of affirmance of the court of civil appeals, as
320 well as the original judgment entered in the court below, be reversed and set aside and this cause be remanded to the district court of the 26th judicial district for new trial in accordance with law; or, if it so please the court, the judgments of said courts be reversed and the cause be dismissed.

JNO. D. JOHNSON,
GEO. CLARK,
D. C. BOLINGER,
Counsel for Petitioner, The Waters-Pierce Oil Company.

(Endorsed:) App. No. 1827. The Waters-Pierce Oil Company *vs.* The State of Texas. Application for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, April 22, 1898. R. H. Connerly, clerk. Filed in supreme court April 22nd, 1898. Chas. S. Morse, clerk, by F. T. Connerly, deputy. Refused.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing sixteen pages contain a true and correct copy of the petition for writ of error in application No. 1827, The Waters-Pierce Oil Company, applicant, *vs.* The State of Texas, filed in this court on April 22nd, 1898, and refused by this court on the 5th day of May, 1898.

Witness my hand and the seal of said court this the 6th day of June, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Application No. 1827. Waters-Pierce Oil Company *vs.* The State of Texas. Certified copy of petition for writ of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 6th, 1898. R. H. Connerly, clerk.

321 *Order of Supreme Court of Texas Refusing Writ of Error.*

May 5th, 1898.

In Supreme Court of Texas.

WATERS-PIERCE OIL COMPANY *vs.* THE STATE OF TEXAS } From Travis County, Third District.

MAY 5TH, 1898.

This day came on to be heard the application of the Waters-Pierce Oil Company for a writ of error to the court of civil appeals for the third supreme judicial district, and the same having been duly considered, it is ordered that said application be refused; that the applicant, The Waters-Pierce Oil Company, and its sureties, J. G. Palm, Geo. Clarke, and Wm. B. Abadie, pay all costs incurred on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on the application of the Waters-Pierce Oil Company for a writ of error.

Witness my hand and the seal of said court this the 27th day of May, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Application No. 1827. Waters-Pierce Oil Company *vs.* The State of Texas. Copy of judgment in supreme court. Application for writ of error refused. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, May 28, 1898. R. H. Connerly, clerk.

322 *Motion for Rehearing in Supreme Court.*

Filed May 17th, 1898.

In the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

THE WATERS-PIERCE OIL COMPANY
vs.
THE STATE OF TEXAS. } No. 1974.

Appeal from Travis county.

To the honorable the supreme court of the State of Texas:

Your petitioner, The Waters-Pierce Oil Company, appellant herein, comes, after judgment of this court refusing a writ of error, and here now prays the court for a rehearing of said application, and that it may please the court to reconsider its judgment rendered at a former day of this term refusing such writ of error.

I.

It would be a useless consumption of the time of this court to reiterate the various assignments of error upon which said application for writ of error was based or to take up the further time of the court in discussing all the points presented in the application for writ of error. Counsel for appellant assumes, in view of the previous decisions of this court, that on the propositions contained in appellant's first assignment of error in said application further argument upon said points would be useless. Without waiving any of the assignments of error presented in said application, all of which are believed to be good by counsel for appellant, counsel would
323 especially call the attention of the court to section 4 of the acts of 1889 and of 1895, upon which this court has never directly passed, except in its refusal of a writ of error in this case. Said article 4 is as follows:

"Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the district court of Travis county in the name of the State of Texas" (General Laws 1895, p. 113; General Laws 1889, p. 141).

That this section of the statutes, upon which this forfeiture is altogether based, was intended to drive from the State any foreign corporation violating any of the provisions of either act is manifest. The terms of the statutes in this regard do not admit of any other construction. The statutes do not provide that upon a judicial information of forfeiture the courts are authorized to relax the terms of the statute and to permit any foreign corporation violating any of the provisions of the acts from doing certain business in Texas, but, to the contrary, the courts are required in executing this law,

and in an emergency of this character, to prohibit foreign corporations from doing any business in this State, interstate or local.

That this is in excess of the power of the State is manifest by a long line of decisions by the Supreme Court of the United States. In Postal Telegraph Cable Co. *vs.* Adams, 155 U. S., in discussing this question of interstate commerce, Mr. Chief Justice Fuller, delivering the opinion of the court, held that a State could not exclude from its limits a corporation engaged in interstate or foreign commerce either directly in terms or indirectly by the imposition of inadmissible conditions (155 U. S., p. 696). See, also, the
324 very elaborate opinion of the court in Leisy *vs.* Hardin, 135 U. S., 107. The point we make now and the point we endeavored to impress upon the court in the application for writ of error was that this feature of the statute (section 4) having been enacted in such broad terms as to embrace not only a local business, but interstate-commerce business, it rendered both statutes unconstitutional, because these sections of the statutes were not separable from other provisions, and that they necessarily applied to and governed in the case at bar, the action in this case being based exclusively upon these sections. In other words, that the State, by its legislation, having attempted in these sections to grasp a jurisdiction which was vested in the General Government exclusively, it was entirely beyond the power of the court in administering these sections to so qualify them by judicial limitation as to bring them within the purview of constitutional limitation.

The cases cited by counsel for appellant from the Supreme Court of the United States we submit are directly in point, to wit:

U. S. *vs.* Reese, 92 U. S., 214.
U. S. *vs.* Harris, 106 U. S., 629.
Trade-mark cases, 100 U. S., 82.
Baldwin *vs.* Franks, 120 U. S., 678.

If the court has not examined these decisions, and we assume, without disrespect, that the limited time supervening between the submission of the application for writ of error and its refusal would indicate that such was the case, we respectfully ask the court to make such examination now. The authorities cited, we submit, are not only directly in point, but they are emanations from the highest judicial tribunal of the nation, having final jurisdiction over the identical question embraced in our contention. This being the case, they ought to govern, regardless of the individual views of this court.

325 We may be pardoned for adding that the impression derived from the opinion of the honorable court of civil appeals in this case would seem to indicate that said court was under the impression that commerce ceased to be interstate commerce whenever the goods imported reached the State, and that thereafter if the importer sold them he became a local dealer, and therefore subject to local regulations. The fallacy of this idea is manifest from a hundred decisions of the Supreme Court of the United States, beginning with Gibbons *vs.* Ogden and running down to date. The mere fact

that the importer has a local establishment within the State does not of itself make him or his property subject to local regulation. As stated by the Supreme Court in very many decisions, if this were so it would entirely defeat and annul the whole doctrine of interstate commerce. So long as the importer imports his goods and sells them in unbroken packages, so long are they exempt from State regulation. It matters not whether he be a local dealer or otherwise, nor the extent of his business nor where he may be situated, he and his business are free from local regulation and control, for until he disposes of his goods so imported they do not become commingled with the general mass of property of the State. Of course, when disposed of they do. The court of civil appeals seems to have considered that the fact that appellant sold goods in Texas made it necessarily a local dealer, which, of course, is error.

II.

We submit also that there was reversible error in the charge of the trial court Nos. 11, 13, and 20, with reference to the liability of appellant for the acts of its agent, and also in refusing the charges asked by appellant upon the same point. (See original application, pp. 12, 13, 14, 15.)

III.

We submit also that the court of civil appeals erred mate-
326 rially in sustaining the ruling of the court below in its charge upon the preponderance of the evidence. (See original application, pp. 15, 16.)

IV.

Appellant shows to the court that M. M. Crane, Esq., attorney general of the State of Texas, and T. A. Fuller, Esq., assistant, are counsel of record for appellee, The State of Texas, and that they each reside at the city of Austin and county of Travis and State of Texas. The appellant therefore comes and moves the court for a rehearing of this cause, and that due notice thereof in accordance with the terms of the statute be given to counsel for appellee, The State of Texas, and upon further consideration it may please this court to grant such rehearing.

JNO. D. JOHNSON,
CLARK & BOLINGER,
Counsel for Appellant.

(Endorsed:) Motion No. 593. The Waters-Pierce Oil Company *vs.* The State of Texas. Motion for rehearing. Filed in supreme court May 17th, 1898. Chas. S. Morse, clerk, by F. T. Connerly, deputy. Overruled.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above and foregoing four pages contain a true and correct copy of the motion for rehearing of application No. 1827,

Waters-Pierce Oil Company *vs.* The State of Texas, which said motion was filed in this court on March 17th, 1898, and overruled on May 26th, 1898.

Witness my hand and the seal of said court this the 6th day of June, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Motion No. 593. Waters-Pierce Oil Company *vs.* State of Texas. Certified copy of motion for rehearing. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 6th, 1898. R. H. Connerly, clerk.

327 *Order of Supreme Court of Texas Overruling Motion for Rehearing of Application for Writ of Error.*

WATERS-PIERCE OIL COMPANY
vs.
THE STATE OF TEXAS. } Motion No. 593.

MAY 26TH, 1898.

Motion for rehearing of application No. 1827: Motion overruled.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the order of the supreme court made on May 26th, 1898, overruling the motion for rehearing of application No. 1827, Waters-Pierce Oil Company *vs.* The State of Texas.

Witness my hand and the seal of said court this the 6th day of June, A. D. 1898.

[SEAL.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Mo. No. 593. Waters-Pierce Oil Company *vs.* The State of Texas. Certified copy of order of supreme court overruling motion for rehearing of application No. 1827. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 6th, 1898. R. H. Connerly, clerk.

328 *Bill of Costs in Supreme Court.*

Certified copy bill of costs, supreme court.

WATERS-PIERCE OIL CO.
vs.
THE STATE OF TEXAS. } No. 1827.

Filing application	.50
Docketing petition	.50
Entering appearances of counsel	.50
Filing 6 papers	1.80

Entering orders	.50
Entering judgment on application	1.00
Certified copy of judgment	1.00
Taxing costs of application	.50
Certified copy of bill of costs	1.00
Filing and entering motion No. 593	.55
Total	$7.85

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, this the 27th day of May, 1898.

[SEAL.] CHAS. S. MORSE, *Clerk.*

(Endorsed:) Application No. 1827. Certified copy bill of costs in supreme court, Austin. Waters-Pierce Oil Co. *vs.* The State of Texas. $7.85. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, May 28th, 1898. R. H. Connerly, clerk.

329 *Writ of Error Bond.*

Filed June 4, 1898.

Know all men by these presents that the Waters-Pierce Oil Company, a corporation duly created and organized under the laws of the State of Missouri, with its principal office at the city of St. Louis, in said State of Missouri, as principal, and George Clark, Wm. B. Abadie, and Geo. B. Zimpelman, as sureties, are held and firmly bound unto the State of Texas, in the sum of one thousand dollars, to be paid to said State of Texas; for which payment, well and truly to be made, the said Waters-Pierce Oil Company and the said Geo. Clark, Wm. B. Abadie, and Geo. B. Zimpelman and each of them jointly and severally bind themselves and their successors, heirs, executors, and administrators and each of them firmly by these presents.

The condition of this obligation is such that where the above-named Waters-Pierce Oil Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the court of civil appeals for the third supreme judicial district of the State of Texas in an action appealed therefrom — the district court of the 26th judicial district of said State, wherein in said court of original jurisdiction The State of Texas is plaintiff and the said Waters-Pierce Oil Company is defendant: Now, therefore, if the above-named Waters-Pierce Oil Company shall prosecute its writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof the said Waters-Pierce Oil Company has caused its corporate seal to be hereto affixed and these presents

to be executed by its president, thereto duly authorized,
330 and the said Geo. Clark, Wm. B. Abadie, and Geo. B. Zimpelman have hereto set their hands and seals this 4th day of June, A. D. 1898.

THE WATERS-PIERCE OIL COMPANY,
[SEAL.] By H. C. PIERCE, *President.*
GEO. CLARK. [SEAL.]
GEO. B. ZIMPELMAN. [SEAL.]
WM. B. ABADIE. [SEAL.]

Approved this the 4th day of June, A. D. 1898.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals,
Third Supreme Judicial District of Texas.

(Endorsed:) No. 1974. The Waters-Pierce Oil Company, plaintiff in error, *vs.* The State of Texas, defendant in error. Writ of error bond. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 4, 1898. R. H. Connerly, clerk.

Assignments of Error.

Filed June 4, 1898.

In the Court of Civil Appeals of the State of Texas.

THE WATERS-PIERCE OIL COMPANY, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

In the matter of the writ of error granted in said case.

The plaintiff in error, The Waters-Pierce Oil Company, assigns as error in said case the following, to wit:

331 I.

The court of civil appeals of the State of Texas erred in holding with the trial court that the statutes of the State of Texas of 1889 and 1895, commonly known as the anti-trust acts, were not violative of the Constitution of the United States, because said acts expressly discriminate in their operation and effect between persons and classes and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, merchants, and professional men for acts which they expressly authorize farmers and stock-raisers to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and expressly violative of the fourteenth amendment to the Constitution of the United States.

II.

The court further erred in holding that said acts did not violate the Constitution of the United States, because said acts did not ex-

empt, except indirectly, certain classes of citizenship from their operation, but they exempted certain classes of property, the annual earnings of the farmer and stock-raiser, from denunciation while such earnings remain in the hands of the original producer and raiser, and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock-raisers under a certain state of circumstances from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock-raisers are not treated alike, even with reference to their annual earnings. There is therefore an absence of that classification upon which the court reposes for the justification of its ruling.

III.

The court further erred in holding said statutes not vio-
332 lative of the Constitution of the United States, because they in their natural operation and effect deprive many citizens and persons of their property and liberty without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and they take from many persons and citizens their rights of property by mere statutory enactment, without due condemnation, according to the law of the land.

IV.

The court further erred in holding that said statutes were not violative of the Constitution of the United States because said statutes—

(Section 4) assume the power of the State to deny to every foreign corporation the right to do any business in Texas, interstate or otherwise, and it was not competent for the trial court or the court of civil appeals of the State of Texas by judicial limitation, as was attempted and had in this case, to restrict the operation of said sections to local business alone, as said sections in each act must be construed as an entirety and are not separable by judicial construction so as to eliminate a manifest unconstitutionality as to the jurisdiction of the State and her courts, and to validate by judicial construction portions of the section as applicable solely to local business.

V.

The court further erred in holding said statutes not to be violative of the Constitution of the United States, because said statutes usurp and were intended to usurp the authority and jurisdiction of the United States and the other States in the matter of prosecution for acts occurring beyond the territorial limits of the State of Texas.

333 VI.

The court further erred in holding with the trial court that the case at bar was a controversy of a civil nature and in approving the

ruling of the court below in refusing to instruct the jury, upon request by plaintiff in error, that if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature.

JNO. D. JOHNSON,
GEO. CLARK, AND
D. C. BOLINGER,
Counsel for Plaintiff in Error.

(Endorsed:) No. 1974. The Waters-Pierce Oil Company, plaintiff in error, *vs.* The State of Texas, defendant in error. Assignments of error. Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 4, 1898. R. H. Connerly, clerk.

334 *Bill of Costs in Court Civil Appeals.*

WATERS-PIERCE OIL CO. *vs.* STATE OF TEXAS. } No. 1974.

Filing record	.50
Docketing cause	.50
Appearances	1.00
Filing briefs	1.50
Filing and entering motion	.35
Orders	2.00
Filing 15 extra papers	1.50
Judgment	1.00
Taxing costs	.50
Recording	18.60
Certified copy of bill of costs	.75
Notice setting case	1.50
Notice on rehearing	2.00
Notice, result of case	2.00
Copies, orders to supreme court	2.00
Costs of supreme court of Texas	7.85
Transcript fee to U. S. Supreme Court	224.70
Total	$268.25

335 *Clerk's Certificate.*

CLERK'S OFFICE,
COURT OF CIVIL APPEALS, AUSTIN, TEXAS.

I, R. H. Connerly, clerk of the court of civil appeals, 3rd supreme judicial district of Texas, hereby certify that the foregoing 334 pages contain a true and correct copy of all proceedings had in the district court of Travis county, 26th judicial district of Texas, in the court of civil appeals of the 3rd supreme judicial district of Texas, and in

the supreme court of the State of Texas, as the same appear from the papers and files of record in my office.

Witness my hand and the seal of said court, at office at Austin, Texas, this the 8th day of June, A. D. 1898.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY, *Clerk.*

336 In the Court of Civil Appeals, Third Supreme Judicial District of Texas.

THE WATERS-PIERCE OIL COMPANY
vs.
THE STATE OF TEXAS. } No. 1974.

To the honorable justices of said court:

Your petitioner, The Waters-Pierce Oil Company, comes and shows to the court that in this controversy there was drawn in question by appropriate pleadings and action in the trial court and also in this court, and also in the application of petitioner for a writ of error to the supreme court of the State of Texas, which has been refused, the validity of a treaty or statute of or an authority exercised under the United States, and the decision has been against their validity, and there was also drawn in question the validity of a statute of or authority exercised under the United States, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision has been in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision has been against the title, right, privilege, or exemption specially set up and claimed under such clause of the said Constitution, treaty, statute, or commission, to wit, by demurrer and by plea in the trial court taken at appropriate time and also by charges asked and refused, all of which are manifest of record, petitioner set up, claimed, and contended that certain statutes of the State of Texas, being chapter 117 of the General Laws of Texas of 1889, approved March 30th, 1889, and chapter 83 of the General Laws of the State of Texas of 1895,
337 approved April 30th, 1895, said acts being commonly known and designated as the anti-trust acts of the State of Texas, were violative of and repugnant to the provisions of the Constitution of the United States, and particularly to the provisions of article 5 and the amendments thereto and of section 1, article 14, of the amendments thereto, and the decision has been that said several statutes were not violative of and repugnant to the foregoing provisions of the Constitution of the United States, and was in favor of the validity of said statutes and the authority exercised by defendant under and in pursuance of said statutes.

Petitioner shows that by such action of this court a manifest error hath been committed and hath happened, to the great damage of

this petitioner, as petitioner believes and avers and as appears by the record herein of this cause, which record is here again submitted to this court.

Your petitioner shows that after the decision and judgment of this court this petitioner, in terms of law and within the time limited by law, did make due application to the supreme court of the State of Texas for a writ of error in this cause, wherein and whereby the errors of this court in the premises might be corrected, but such writ of error so applied for was refused by the supreme court of the State of Texas, and the record of this cause now remains with and in this court. Your petitioner is desirous of applying to the Supreme Court of the United States for a writ of error in terms of law to correct what it believes to be the manifest errors of this court in its judgment aforesaid, and it now prays for the allowance of such writ by this court as it is authorized to grant in the premises, in order that said errors, if any, may be duly corrected.

Wherefore petitioner comes and prays the court for an allowance of writ of error from the Supreme Court of the United States to this court, and that the writ of error in terms of law may be duly allowed by the honorable the chief justice of this court, in
338 accordance with the laws of the United States and the rules and order of practice in said Supreme Court of the United States.

JNO. D. JOHNSON,
GEO. CLARK, &
D. C. BOLINGER,
Counsel for the Waters-Pierce Oil Company,
Plaintiff in Error.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

JUNE 4TH, 1898.

The foregoing petition having been presented to me for allowance of writ of error in this cause, entitled The Waters-Pierce Oil Company, appellant, *vs.* The State of Texas, appellee, said writ of error is hereby allowed upon The Waters-Pierce Oil Company, plaintiff in error, filing with the record in this cause its bond in the sum of one thousand dollars, with sureties to be approved by me, which bond shall operate as a supersedeas.

Witness my hand at Austin, Texas, on the day and date above written.

H. C. FISHER,
Chief Justice Court of Civil Appeals, Third Supreme Judicial District of Texas.

Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 4th, A. D. 1898.

R. H. CONNERLY, *Clerk.*

339 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the justices of the court of civil appeals for the third supreme judicial district of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the third supreme judicial district of the State of Texas, before you or some of you, said court being the highest court of law and equity of the said State in which a decision could be had in the suit between The Waters-Pierce Oil Company, as appellant, and The State of Texas, as appellee, in an action for forfeiture, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, laws, and treaties of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and wherein was set up, claimed, and contended that certain statutes of the State of Texas, being chapter 117 of the General Laws of the State of Texas of 1889, entitled "An act to define trusts, to provide penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 21st, 1889, as well as chapter 83 of the General Laws of the State of Texas of
340 1895, entitled "An act to define trusts, provide for penalties and punishment of corporations, persons, and firms, and associations of persons connected with them, and to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act," approved April 30th, 1895, were violative of and repugnant to the provisions of the Constitution of the United States, and particularly to the provisions of article 5 of the amendments thereto and of section 1 of article 14 of the amendments thereto, and the decision was that said several statutes were not violative of and repugnant to the foregoing provision of the Constitution of the United States and was in favor of the validity of said statutes, a manifest error hath happened, to the great damage of the said Waters-Pierce Oil Company, as is stated and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United

States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at said place before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of June, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

D. H. HART,
Clerk of the Circuit Court of the United States for the Western District of Texas.

Allowed by—

H. C. FISHER,
Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Filed in court of civil appeals, 3rd sup. judicial district, Austin, Texas, June 4th, A. D. 1898.

R. H. CONNERLY, *Clerk.*

341 The United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, 1898, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the third supreme judicial district of Texas, wherein The Waters-Pierce Oil Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. C. Fisher, chief justice of the court of civil appeals for the third supreme judicial district of Texas, on this the 4th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

H. C. FISHER,
Chief Justice of the Court of Civil Appeals, Third Supreme Judicial District of Texas.

Service of the foregoing citation is hereby accepted this the 4th day of June, 1898.

M. M. CRARY,
Att'y Gen'l of Texas.

——— ———,
Counsel for Defendant in Error.

Filed in court of civil appeals, 3rd supreme judicial district, Austin, Texas, June 4th, A. D. 1898.

R. H. CONNERLY, *Clerk.*

Endorsed on cover: Case No. 16,919. Texas court of civil appeals, 3rd judicial district. Term No., 334. Waters-Pierce Oil Company, plaintiff in error, *vs.* The State of Texas. Filed June 22nd, 1898.

No. 934. 97
Motion to advance.
SUPREME COURT, U. S.
FILED
JUL 15 1898
JAMES H. McKENNEY,
CLERK.
Filed July 15, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.

OCTOBER TERM, 1898.

THE WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO ADVANCE.

EDWARD VON BOECKMANN PUB. CO., PRINTERS, AUSTIN, TEXAS.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C.

OCTOBER TERM, 1898.

THE WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION TO ADVANCE.

To the Honorable, the Supreme Court of the United States:

This suit was instituted in the trial court by the State of Texas against the Waters-Pierce Oil Company, as defendant, for the purpose of cancelling the permit of the plaintiff in error, a corporation organized under the laws of Missouri, to do business in Texas, for the reason that it had in numerous instances therein charged violated the Texas statute known as the "anti-trust law," by making agreements and contracts in restraint of trade. Among the several defences interposed by the appellant company in the court below was that the Texas statute was uncon-

stitutional in that it violated the fourteenth amendment to the Constitution of the United States.

A judgment was rendered against the defendant company cancelling its permit to do business in Texas. From this judgment it appealed to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. The appeal resulted in the affirmance of the case. The plaintiff in error then sought to have the judgment reviewed by the Supreme Court of the State on writ of error, but its application for writ of error was denied. It then brought the case to this court by writ of error. As above indicated, the State of Texas is a party to the suit.

The State of Texas, by its Attorney General, therefore, moves the court to advance said cause on the docket of this court, and set same down for trial at the earliest date possible, consistent with the convenience of this court. In this connection the defendant would respectfully suggest that it be set for a date not later than the first of December, 1898, and as near to the date that the other cases to which the State of Texas is a party are set as possible.

Defendant in error insists that the motion should be granted:

1. Because the State of Texas is a party.

2. Because the question of the validity of the anti-trust statute in Texas affects matters of general public interest not only to the people of Texas, but all those who have commercial dealings with her people.

3. Because the case is one of special and peculiar circumstances, such as to justify its advance under the rules of this court.

Defendant in error further represents that George Clark, Esq., and D. C. Bolinger, Esq., who reside in Waco, McLennan County, Texas, and J. D. Johnson, who resides in the City of St Louis, State of Missouri, are counsel for plaintiff inerror, and upon whom services is asked to be made.

W. M. Crane Att'y Gen'l.,

Attorney for the State of Texas, Defendant in Error.

Plaintiff in error hereby waives issuance and service of notice of this motion and agrees that this memorandum may be accepted in lieu thereof.

Jas. D. Johnson

Geo Clark

D. C Bolinger

Attorneys for plaintiff in error.

No. 334.
Brf. of Johnson & Clark for P. & C.
Filed Oct. 8, 1898.

Office Supreme Court, U. S.
FILED
OCT 8 1898
JAMES H. McKENNEY, Clerk

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ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFF IN ERROR.

JOHN D. JOHNSON,
GEO. CLARK,
D. C. BOLINGER,
Counsel for Plaintiff in Error.

PRESS OF NOBLE BATTLE, WACO.

IN THE

SUPREME COURT OF THE UNITED STATES.

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vs.

THE STATE OF TEXAS, Defendant in Error.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On February 5th, 1896, the State of Texas instituted its action against the Waters-Pierce Oil Company and certain agents of said company in the District Court of Travis County, Texas, for the purpose of canceling the permit theretofore granted by said state to said company, which company was a foreign corporation incorporated under the laws of the State of Missouri, to do business in the State of Texas, and to adjudge a forfeiture of its right to do any business in the State of

Texas by reason of alleged violations by said company and its agents of two certain statutes of the State of Texas generally known and styled as the "Anti-Trust Acts" of said state, the first of said acts having been enacted on March 30th, 1889, and the other on April 30th, 1895. These acts are as follows:

"CHAP. 117. (S. H. Rs. Nos. 9, 117, 136, 192, and 313.) An Act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas.

SECTION 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by which two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First, To create or carry out restrictions in trade. Second, To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third, To prevent competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth, To fix at any standard of figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce, intended for sale, use, or consumption in this state. Fifth, To make, or enter into, or execute, or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the attorney-general, or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the state, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney-generul to enforce this provision by injunction, or other proper proceedings in the district court of Travis County, in the name of the State of Texas.

SEC. 5. That the provisions of Chapter 48, General Laws of this state, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. Any violation of either or all the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination, as defined herein, exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written

instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

SEC. 9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act which do not in their commission necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

SEC. 10. Each and every firm, person, corporation, or association of persons, who shall in any manner violate any of the provisions of this act, shall, for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense was committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general, or the district or county attorney, to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

SEC. 12. That the provisions hereof shall be held cumulative of eachother, and of all other laws in any way affecting them now in force in this state.

SEC. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

SEC. 14. Whereas, the people of this state are without a remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule, which requires that all bills shall be read on three several days, be suspended, and that this act shall take effect from and after its passage, and it is so enacted.

(NOTE.—The Foregoing act originated in the house, and passed the same by a vote of 86 yeas, no nays; and passed the senate by a vote of 26 yeas, no nays.)

Approved March 30, 1889."

"CHAP. 83. (H. B. No. 404.) An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to

promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act.

SECTION. 1. Be it enacted by the Legislature of the State of Texas, "That an act entitled, "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889, be so amended as to hereafter read as follows:

SECTION 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard of figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

5. To make or enter into, or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article of commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity of transportation between them, or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the

laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney-general or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the State where such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney-general to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the State of Texas.

SEC. 5. That the provisions of chapter 48, General Laws of this state, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. If any person shall be or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either any or all of the following purposes:

1. To create or carry out restrictions or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state.

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of,

or transport any article, or commodity or article of trade, use, merchandise, commerce, commerce or consumption, below a common standard figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations, shall be punished by fine of not less than fifty nor more than five thousand dollars, and by imprisonment in the penitentiary of not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputa- as such.

SEC. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not, in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state.

SEC. 10. Each and every firm, person, corporation or association of persons who shall, in any manner, violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of

fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general or the district or county attorney to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable, either in law or equity.

SEC. 12. That the provisions hereof shall be held cumulative of eachother, and of all other laws in any way affecting them now in force in this state: Provided, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

SEC. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the state to recover penalties, or to affect the right of the state to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this State, or to affect the right of the state to maintain prosecutions for vjolations thereof, under any law of this state relating to trusts, for acts heretofore done.

SEC. 14. Any court, officer or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury may subpœna persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections, about which he may testify fully and without reservation.

SEC. 15. All laws or parts of laws in conflict with this act are hereby repealed.

SEC. 16. Whereas, the people of this state are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule, which requires that all bills shall be read on three several days, be suspended, and it is so enacted.

Approved April 30, 1895."

After answer filed by defendant company, to-wit, on May 12, 1897, the State amended its original petition and made the following allegations as grounds for forfeiture:

1. That the Waters-Pierce Oil Company had complied with the laws of the State of Texas with reference to foreign corporations and had secured a permit in accordance with said laws to transact business in said State for the term of ten years from July 6, 1889, and that since said date, it, said company, had been transacting business in Texas in the sale of illuminating and other oils.

2. That in pursuance of unlawful combinations between said Waters-Pierce Oil Company and the Standard Oil Trust, of New York, it had divided the State into five grand divisions, appointed an agent for each of such divisions, and with many local agents throughout the cities and towns in the state.

3. That on the second day of January, 1882, a great many firms, partnerships, individuals and corporations had entered into a trust agreement with reference to the manufacture, refining and sale of oils in the City of New York, and setting out what is known as the Standard Oil Agreement in full, which agreement bears date on said day.

4. The State further averred that the real object, purpose and intent of said firms, partnerships, individuals and corporations in making said agreement was to control and monopolize the petroleum industry in the United States and the several states, and that by the making of said agreement there was created a combination of capital, skill and acts for the purpose of effecting such monopoly, following the language of the Texas statutes as to the purposes named.

5. The State further set forth various allegations with reference to said Standard Oil Trust which need not be more particularly stated here, except that it was alleged that the United States was divided into various subdivisions, and that the following territory, to-wit, Southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory, and a part of Louisiana, was assigned to the defendant company for its operation under

the trust. It was also averred that the defendant company, the Waters-Pierce Oil Company, became a party to said trust agreement and since the 6th day of July, 1889, the date of its permit to do business in Texas, said company had in the State of Texas, by and through its agents, being the other defendants named, and numerous local agents in Texas, had observed, performed and carried out the purposes, objects and policies of said trust agreement, alleging among other things as to the conduct of the Waters-Pierce Oil Company in effectuating said trust, that it established in various localities in Texas warehouses, tanks and other depositories for the storage and reception of its oils; that it shipped its oils into Texas consigned to its managers and other agents, which oils were stored and sold to merchants and dealers in such quantities as the buyer desired to purchase. It was alleged that the State did not know the exact time at which the Waters-Pierce Oil Company became a party to said trust, but that since the date of its permit to do business in Texas the company had observed, performed and carried out said trust agreement and is still doing so in the following manner: that a sufficient number of shareholders of the defendant company, including some of its officers and directors, had entered into said trust agreement without attaching corporate name and seal of said defendant company thereto and the official designation of its officers; and that upon entering into said agreement in manner aforesaid, a sufficient number of shares in defendant company's capital stock had been transferred to the Standard Oil trustees in accordance with the provisions of said trust agreement, to enable said trust to control the operations of the defendant company, and that in lieu of said shares, trust certificates had been issued to said stockholders in an amount equal to the appraised value of the stock so transferred. It was further charged that the Standard Oil trustees in addition to such acquisition of shares of capital stock, had purchased other stock and bonds of the Waters-Pierce Oil Company, sufficient to give

it control of said corporation and to enable the Standard Oil trustees to exercise a supervising and controlling authority over the affairs of the Waters-Pierce Oil Company and the management, conduct and control of its business; and that since July 6th, 1889, the date of defendant's permit, the Standard Oil trustees were able to, and did control the action of the Waters-Pierce Oil Company in the selection of its officers and irectors and in the conduct and management of its business in Texas, and that the Waters-Pierce Oil Company had never taken any corporate action or made any complaint against said stockholders, directors and officers signing said trust agreement, nor against the stockholders nor officers surrendering or canceling their stock to the Standard Oil trustees, nor against any of the acts recited, nor had any objection or complaint been made to the officers, directors or stockholders of the Waters-Pierce Oil Company against such surrender and exchange of stock, but that the defendant company acquiesced in such transfer and exchange, control and supervision, and that the directors of the Waters-Pierce Oil Company managed the business of said company so as not to conflict with the policy fixed from time to time by the Standard Oil trustees, and that the net earnings of the Waters-Pierce Oil Company, since said trust agreement, are declared and paid out as dividends upon the capital stock, and the Standard Oil trustees have received their proportion of such dividends. The State further alleged that there were a large number of other corporations and companies in the United States in which stock was held in a similar way and with a similar effect, and from the accumulated dividends received by the Standard Oil trustees, dividends were declared and paid out by said trustees to the holders of Standard Oil certifictes, and not from the earnings of any special company; that in pursuance of a policy fixed by the trust agreement, defendant had occupied and still occupies and carries on its business exclusively in a sub-division of the territory of the United States designated as afore-

said, to-wit, Southwesern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory and a part of Louisiana, and does not invade or transact any of its business in any portion of the territory allotted to other members and parties in said trust agreement, or compete with them in any manner; and that none of the other members or parties to the trust agreement do business in Texas in competition with the Waters-Pierce Oil Company, and that by reason thereof there was no competition in the sale of oils or other products of petroleum in Texas between the Waters-Pierce Oil Company and any member of said trust whereby the Waters-Pierce Oil Company had monopolized and still monopolizes and controls the trade in petroleum and its products in Texas.

6. That since the 6th day of July, 1889, the defendant, the Waters-Pierce Oil Company, had been engaged in selling oils and products of petroleum in Texas, and through its agents and officers in Texas had been making contracts and agreements with various merchants and other dealers by the terms of which agreements and in consideration that the Waters-Pierce Oil Company would pay the dealers a small rebate on the oil purchased, they, the said merchants and dealers, had contracted with the Waters-Pierce Oil Company that they would not buy any oils from any other person or corporation, but would deal exclusively with defendant company, which contracts and agreements were sometimes verbal and sometimes in writing; and said amended petition set forth the names of various merchants and dealers residing in different parts of the state who had entered into such agreement. The State further alleged that the Waters-Pierce Oil Company since the 6th day of July, 1889, had made other contracts with retailers and dealers in petroleum in the State of Texas, by the terms of which the said merchants and dealers had contracted and agreed with said company to buy their oils exclusively from said company and in some instances further agreed not to sell the oils so bought to

any one dealing with any other person or corporation, setting forth the names and residences of such merchants and dealers. The State further alleged that since said July 6th, 1889, the Waters-Pierce Oil Company had made other contracts and agreements through its agents with various merchants and other dealers, whereby such merchants and dealers had contracted and agreed with the defendant company to sell said oils to its customers at prices fixed and established by said company, or its agents and officers, setting forth the names and residences of three merchants with whom said contracts were made.

7. The State further averred that prior to July 6th, 1889, to-wit, about the year 1881, the defendant company entered into a contract in writing with certain jobbers and wholesale merchants at Brownsville, Texas, and afterwards with other merchants in Brownsville, under the terms of which contract said merchants obligated themselves to purchase all their oils from defendant company at prices established by it and its agents, from which prices they, said merchants, were to receive a rebate of 15 cents per box on making settlements at the end of each month, which rebates were confined exclusively to those who were parties to the contract, and said oils were to be sold by said dealers at invoice price fixed by defendant company, which portion of said petition sets forth the names of said merchants and dealers at Brownsville under the provisions of said contract.

8. As a further ground of forfeiture, the State alleged that the defendant company had purchased the stock, good will, etc., in Texas, of the Eagle Refining Company, a corporation created under the laws of the State of Ohio, with its principal office in the city of Cleveland, and thereafter had conducted the business at Dallas, Texas, under the name of the Eagle Refining Company; that said purchase was in violation of the statute, in that the two corporations were engaged in the same line of business and that said purchase affected the production of petroleum

and its sale in Texas. It also alleged, as a further ground of forfeiture that a contract had been entered into between defendant company and one C. W. Robinson, of Houston, Texas, said Robinson being at the time an independent dealer in oil and petroleum products, under the terms of which the defendant company secured the control and management of the business of Robinson and employed him as agent,, which was alleged to be in violation of the anti-trust laws hereinbefore set out, and further cause of forfeiture.

9. The State further averred that the Waters-Pierce Oil Company since the date of its permit in 1889, had been guilty of gross abuses and misuses of its charter privileges and franchises in the state, for that in order to monopolize and control the trade in oil in Texas, the Waters-Pierce Oil Company, through its agents and officers, entered into the contracts set forth and were still engaged in making and carrying out similar contracts with other merchants and dealers in Texas, and that said company boycotted all dealers who refused to buy oils from it, refused to sell them oils and in case of competition in any locality, the Waters-Pierce Oil Company immediately cut the price of its oils below the reasonable and fair market price of the same, and by a system of threats and intimidation and bribery, prevented dealers in the state from buying or selling competitive oil, and had pursued, and was pursuing this course in the State of Texas, by reason of which contracts, agreements, combinations and trusts, together with the gross abuse and misuse of its corporate powers and privileges, said Waters-Pierce Oil Company had forfeited its right and permit to do business in Texas, and that said contracts and conspiracies on the part of the Waters-Pierce Oil Company constituted frauds upon the state in violation and contravention of its laws, were in restraint of trade, destructive of competition, and created a monopoly in Texas, thereby constituting grevious burdens upon the people of said state and were against public policy.

10. Upon these allegations the prayer of the State was for a writ of injunction restraining and prohibiting the Waters-Pierce Oil Company, its managers, officers, agents and representatives from carrying out the alleged agreements, combinations and trusts, from doing the unlawful acts and things mentioned, and from the misuse and abuse of its corporate powers and privileges; with further prayer that upon final hearing, temporary injunction should be perpetuated, and decree and judgment rendered canceling the permit of the Waters-Pierce Oil Company to do business in Texas and prohibiting it from doing any business in said State, either by itself or through its officers, managers, agents or representatives. (For petition see Record, pp. 1-23).

DEFENDANT'S ANSWER.

The amended answer of defendant, in reply to the amended petition of plaintiff, filed June 2, 1897, pleaded as follows: First, a general demurrer, followed by specifications of demurrer, setting up that the acts of March 30, 1889, and of April 30, 1895, were null and void and inoperative because they and their provisions were violative of the constitution of the United States.

Because said statutes discriminated between different classes of persons and citizens of the State of Texas and of the Unied States, and denied to certain persons and citizens the equal protection of the laws, it appearing upon the faces of said statutes that they authorized the punishment of certain citizens and classes of citizens for acts and omissions expressly authorized to be done and transacted by other classes and citizens; that said acts were in further conflict with the Constitution of the United States, because while pretending to embrace within their purview all classes and conditions of citizens in order to prevent combinations in trade, by their express exemption of citizens engaged in the business of live stock and agricul-

tural products in the hands of the producer or raiser and in giving exemptions to organizations of laborers for the purpose of maintaining standards of wages, the said statutes were limited in their application to a comparatively small portion of the citizenship who were thereby subjected to pains and penalties not inflicted upon the great majority of the people under similar circumstances and conditions, and that such legislation was class legislation.

And further, because said acts attempted to reach out and affect persons resident beyond the territorial limits of the State of Texas, and who are not and never have been personally present in the state, nor done any act within the state which would subject them to penalties.

And further, because said acts attempted to control, regulate and supervise dealings of inter-state commerce, and the allegations of plaintiff's petition showed upon their face that the Waters-Pierce Oil Company was engaged in inter-state commerce.

And further, because the act of March 30, 1889, did not prohibit a trust or declare it illegal, nor did it declare it an offense or propose to punish it, but merely defined a trust without denouncing it, and was therefore not a law, and no suit or prosecution could be maintained under it; and the allegations of plaintiff's amended petition show that most of the transactions complained of, occurred long prior to the passage of the act of April 30, 1895.

The defendant further demurred, specially claiming that said statutes were in contravention of the constitution of the United States in so far as they attempted to restrict the rights of certain classes of citizens to carry on their business enterprises in a customary and lawful manner and to fix and limit the prices of merchandise dealt in and offered for sale by them and to make such contracts and agreements with merchants and others dealing in similar commodities for the payment to the latter of rebates on commodities sold to them or to make other contracts such as were specified in plaintiff's petition.

The defendant further set up varions causes of demurrer to the amended petition of plaintiff, relating to defects of allegation and otherwise, which, in view of the settled decision of this court, need not be recapitulated.

The defendant further answered, pleading the general issue and specially various defenses which are unimportant upon the hearing of this writ of error (for answer, R. pp. 24-41).

Upon the trial, the defendant company asked various charges, among which was charge No. 1 refused by the court, to the effect that said acts of March 30, 1889, and April 30, 1895, known as the anti-trust acts, were contrary to the Constitution of the United States, and were therefore null and void, and that the jury would return their verdict in favor of the defendant. This special instruction was refused by the court (R. p. 52). Among other instructions requested was special instruction No. 7 by defendant, to the effect that under the pleadings and the evidence the jury must find a verdict for defendant. This was also refused (R. p. 55). The court instructed the jury, among other things, to return a verdict for the defendants Hathaway, Austin, Grice, Keenan and Fries, as they were only the agents of defendant company and were not liable in the suit (R. p. 9). The court also eliminated the alleged transactions between the defendant company and the Eagle Refining Company, and with C. W. Robinson and some others in the State of Texas, instructing the jury that such transactions were not believed to be in violation of the law (R. p. 48). The court further withdrew from the jury its charge, any consideration of an alleged combination between the Standard Oil Trust and the Waters-Pierce Oil Company, because the evidence was not sufficient to show that the Waters-Pierce Oil Company ever became a member of said trust in a manner that violated the laws of the State of Texas (R. p. 48).

Judgment was rendered on June 15th, 1897, upon a verdict of the jury in favor of the State, by which judgment

it was decreed that the Waters-Pierce Oil Company be and was thereby denied the right and prohibited from doing any business within the State of Texas and that its permit to do business within said state theretofore issued, be and the same was thereby cancelled and held for naught, and that the Waters-Pierce Oil Company, its managers, superintendents, agents, servants and attorneys were perpetually enjoined and restrained from doing business within the State of Texas. But the judgment contained this further recital, "Nothing herein shall be construed to in any way effect, or apply to, or prohibit said defendant's right to engage in inter-state commerce within this state" (R. pp. 41-42). Judgment was entered by direction of the court also in favor of E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan and Louis Fries against the State, they being merely agents of the defendant company.

All the demurrers of defendant were also overruled by the judgment, to which the defendant excepted and took a bill (See bill of exception No. 1, R. p. 56). The defendant also took a bill of exceptions to the charge of the court on various grounds, and also to the refusal of the special instructions requested by defendant (Bill of exceptions No. 2, R. p. 56-62). Thereafter in terms of law, defendant filed its motion in arrest of judgment, basing such motion among other things upon section 4 of the acts of March 30, 1889, and of April 30, 1895, on the ground of the unconstitutionality of said provision, which is as follows:

"Section 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceeding in the District Court of Travis County, in the name of the State of Texas." (R. pp. 63-64).

Said motion, as well as motion for new trial, was overruled, to which defendant took a bill (R. p. 63). Appeal

was prosecuted in due form to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, having jurisdiction of causes on appeal from Travis County, and on March 9th, 1898, said Court of Civil Appeals handed down its judgment, affirming in all things the judgment of the court below (R. p. 180). Said court also delivered its elaborate opinion on the same day, which is incorporated in the record (R. pp. 161-180).

Thereafter on March 18, 1898, within the time prescribed by law, the plaintiff in error, the Waters-Pierce Oil Company, filed in said Court of Civil Appeals its motion for rehearing, setting up again in said motion the unconstitutionality of said acts of 1889 and 1895, substantially as set up in said demurrers in the trial court (R. pp. 180-195). This motion was overruled by the said Court of Civil Appeals on March 30th, 1898, (R. p. 195). Thereafter on, to-wit, April 22, 1898, in accordance with the practice pertaining in the state courts of Texas, the Waters-Pierce Oil Company filed its petition for a writ of error to the Supreme Court of the State of Texas, again setting up and urging the unconstitutionality of the acts of 1889 and 1895, substantially as set forth in its demurrers and in its assignments of error in the Court of Civil Appeals. This petition for writ of error is in the record (R. pp. 196-206). On May 5, 1898, the Supreme Court of Texas refused the writ of error applied for (R. p. 207). Thereafter on May 17th, 1898, the Waters-Pierce Oil Company filed its motion for rehearing in said Supreme Court, again urging the unconstitutionality of said acts, which motion for rehearing was overruled (R. pp. 208-211); and thereupon on the 4th day of June, 1898, the Waters-Pierce Oil Company sued out its writ of error to this Court, and assigned the following

SPECIFICATIONS OF ERROR.

I.

The Court of Civil Appeals of the State of Texas erred in holding with the trial court that the statutes of the State of Texas of 1889 and of 1895, commonly known as the anti-trust acts, were not violative of the Constitution of the United States, because said acts expressly discriminate in their operation and effect between persons and classes, and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, merchants, and professional men for acts which they expressly authorize farmers and stock raisers to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and experessly violative of the fourteenth amendment to the Constitution of the United States.

II.

The court erred further in holding that said acts did not violate the Constitution of the United States, because said acts did not exempt, except indirectly, certain classes of citizenship from their operation, but they exempted certain classes of property, the annual earnings of the farmer and stock raiser, from denunciation while such earnings remain in the hands of the original producer and raiser, and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock raisers under a certain state of circumstances, from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock raisers are not treated alike, even with reference to their annual earnings. There is, therefore, an absence of that classification upon which the state courts repose for the justification of their rulings.

III.

The court further erred in holding said statutes not violative of the Constitution of the United States, because they

in their natural operation and effect deprive many citizens and persons of their property without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and by mere statutory enactment, without due condemnation, according to the law of the land.

IV.

The court further erred in holding that said statutes were not violative of the Constitution of the United States because said statutes (Section 4) assume the power of the state to deny to every foreign corporation the right to do *any* business in Texas, inter-state or otherwise, and it was not competent for the trial court or the Court of Civil Appeals of the State of Texas, by judicial limitation, as was attempted and had in this case, to restrict the operation of said sections to local business alone, as said sections in each act must be construed as an entirety, and are not separable by judicial construction so as to eliminate a manifest unconstitutionality as to the jurisdiction of the state and her courts, and to validate by judicial construction portions of the section as applicable solely to local business.

V.

The court further erred in holding said statutes not to be violative of the Constitution of the United States, because said statutes usurp and were intended to usurp the authority and jurisdiction of the United States and the other states in the matter of prosecution for acts occurring beyond the territorial limits of the State of Texas.

VI.

The court further erred in holding with the trial court that the case at bar was a controversy of a civil nature and in approving the ruling of the court below in refusing to

instruct the jury, upon request by plaintiff in error, that if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature.

BRIEF OF THE ARGUMENT.

I.

The statutes of the State of Texas of March 30, 1889, and of April 30, 1895, commonly known as the anti-trust acts, are violative of the Constitution of the United States, because said acts expressly discriminate in their operation, and effect between persons and classes of persons the equal protection of the law; they prescribe penalties of felony against artisans, mechanics, merchants, professional men and all other classes except farmers and stock raisers for acts which they expressly authorize the last two classes to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose and expressly violative of the Fourteenth Amendment to the Constitution of the United States.

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283.
G., C. & S. F. Co v. Ellis, 165 U. S., 150.
Duncan v. Missouri, 152 U. S., 382.
Yick Wo v. Hopkins, 118 U. S., 356.
Barbier v. Connally, 113 U. S., 27.
Harding v. People, 160 Ill., 459.
Millett v. People, 117 Ill., 294.
Ex- P. Jentizech (Cal.), 32 L. R. A., 664.
State v. Goodwill, (W. Va.), 6 L. R. A., 621.
Frorer v. People (Ill.), 16 L. R. A., 492.
In re. Garrabad (Wis.), 19 L. R. A., 858.
State v. Loomis, 115 Mo., 307.

State v. Inlow, 128 Mo., 163.
State v. Walsh (Mo. Sup. Ct.), 37 S. W. Rep., 1112.
People v. Marx, 99 N. Y., 377.
Wally v. Kennedy, 2 Yerg., 555.
Van Zant v. Waddell, 2 Yerg., 270-1.
Janes v. Reynolds, 2 Tex., 252.
Ry v. Wilson (Tex.), 19 S. W. Rep., 913.
Cooley on Cons. Lim., p. 355.
Dent v. W. Va., 129 U. S., 114.
San Mateo v. So. Pacific Ry Co., 13 Fed. Rep., 733.

The acts in question are set forth at length in the preceding pages of this brief, and the point intended to be presented herein arises principally upon section 13 of the act of 1889, and the proviso to section 12 of the act of 1895. The latter act is really intended as a substitute for the prior act of 1889, though both acts were construed by the courts below as being in force at the date of trial. These statutes denounce as felonies any combinations of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them, for either, any or all of certain enumerated purposes, such as creating or carrying out restrictions of trade, limiting or reducing the production or to increase or reduce the price of merchandise or commodities, preventing competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or fixing at a standard or figure whereby its price to the public should be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in the state, or entering into, making, executing or carrying out any contract, obligation or agreement of any kind or description by which the parties bind themselves not to sell or dispose of or transport any article or commodity or article of trade, use, merchandise, commerce or consumption below a standard figure, or by which they shall agree in any manner to keep the price

of any article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner settle the price of any article or commodity or transportation between themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any article or commodity, or by which they shall agree to pool, combine or unite any interests they may have in connection with the sale or transportation of any such article or commodity so that its price might in any manner be affected. And after providing unusual and startling provisions for the enforcement of said statutes, and denouncing the penalties against each and every person without discrimination who violated the provisions of the statutes, the Legislature of Texas in the act of 1889, inserted this provision:

"Section 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

And in the act of 1895 the Legislature of Texas inserted the following provision:

"Section 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state: *Provided*, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages."

It will be observed that said acts do not exempt directly, certain classes of citizenship in their operation, but they exempt certain classes of property, the annual earnings of the farmer and stock raiser from denunciation, while such earnings remain in the hands of the original producer and raiser;. and they also exempt laborers who may combine for the purpose of raising their wages. The natural effect of these laws, however, is to practically exempt substantially all the farmers and stock raisers of Texas from

the pains and penalties denounced by the statutes against all other classes, and to permit the farmers and stock raisers to perform and transact their business with all possible latitude for the protection of their interests while denying to all other classes of citizenship equal privileges.

This court has frequently held in effect that no matter in what language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Collins v. Hampshire, 18 Sup. Ct. Rep., 768.
Morgans L. & T. R. v. La. &c., 118 U. S., 445.
Henderson v. The Mayor &c., 92 U. S., 259.

Looking then to these statutes, the purpose of the exemption is obvious. It unmistakably appears that such purpose was to give special privileges to the farmers and stock raisers, as well as laborers, and to deny equal and similar privileges to all other classes, notwithstanding the verbiage of the respective acts. Indeed, this purpose is not attempted to be concealed; and it is so manifest that the statutes may be very well treated as a plain open declaration on the part of the Legislature of Texas, that from some cause, satisfactory to them, farmers and stock raisers in Texas were entitled to superior privileges over all other citizens and classes of citizens, either in the State of Texas or outside of the state, and citizens of other states of the American Union. We may, therefore, for the present at least, discuss these acts as if the Legislature in their enactment had expressly exempted the classes indicated by the operation of the acts.

This legislation is at least unusual, if not startling. The statute books of no state or country, with which we are familiar, contain anything analogous to some features of this legislation now before the court. Usually, if any act is denounced by legislation as an infamous crime, it applies to all classes of the community indiscriminately. Murder, rape, larceny, robbery, arson, and all other similar infamous offenses are denounced by the laws of every civ-

ilized people without exemption of any classes in their operation, and without authorization on the part of the law-making power to any class or individual guaranteeing him immunity in case of his commission of the act so denounced. Yet in these Texas statutes the law-making power has seen fit to denounce every species of combination or understanding relating to trade, commerce or transportation, the bargain, sale or exchange of any and every commodity in combination, but has taken pains to exempt from the operation of said act and from the penalties denounced practically all the farmers and stock raisers in the State of Texas.

The plea is asserted, in an attempted vindication of this class of legislation that it was not necessary to include the farmers and stock raisers, because experience had demonstrated that they were unable to combine anyway, and that, therefore, no harm was done or could be done any other classes by not including them in the denunciation. We need hardly say to an intelligent court that such argument is altogether without merit. Many persons, by reason of physical disability, or by moral and Christian training and education, are incapable of committing certain crimes; yet no Legislature has ever ventured to exempt such classes from the operations of a general law denouncing as felonies the acts embraced in such crime. It was reserved for the Texas Legislature alone to inaugurate this startling innovation in the legislation of the country; and it is needless to add that the exemptions rendered the legislation purely arbitrary and its provisions as causing discrimination and creating inequalities.

It is true that in the latest expressions of this court (Magoun vs. Illinois Trust and Savings Bank) this court has held that the rule laid down by the Fourteenth Amendment prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude so far as interference by this court is concerned; and that the rule only prescribes that the legislation shall have the

attribute of equality of operation, which equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In other words, that the state may distinguish, elect and classify objects of legislation, and necessarily this power must have a wide range of discretion. But the court in its opinion adds that this rule is not without limitation, and that clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional provision. This court had already decided in G., C. & S. F. Ry Co. vs. Ellis, 165 U. S., that a mere classification was not sufficient to relieve the statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must not appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

We apprehend that the converse of the latter proposition is equally true, and that a discrimination may be equally as potent when directed in favor of one or two particular classes in the community to the disparagement and detriment of other classes as if the discrimination was against any select or particular class; and in the event such discrimination is apparent by reason of favoritism to one or two classes, it would be equally obnoxious to the provisions of the Fourteenth Amendment. The discrimination in this case consists of the latter class. It is a discrimination in favor of three favored classes of a community, constituting, as these classes do, at least 80 per cent of the voting and manhood population of the state. Courts take notice judicially of the census. (Kalbrier vs. Leonard, 34 Ind., 497; Stults vs. State, 65 Ind., 492; People vs. Williams, 64 Cal., 87; Worcester Bank vs Cheney, 94 Ill., 430.) The census figures, as appears from the record in this case (R. p. 146) show that there

are 434,091 male farmers, planters, overseers, agricultural laborers, stock raisers, etc., in Texas, and the voting population of the state is about 540,000 according to the census of 1890. So it appears that the Legislature of Texas, after denouncing certain acts as infamous crimes, and providing for their punishment, proceed to exempt from the operation of the acts about 80 per cent of the male population of the state, leaving the pains and penalties denounced by the act to be restricted to about 20 per cent of the male population of the state. Is this a reasonable classification, if it be a classification? Is it one based upon some difference which bears a just and proper relation to the attempted classification? Rather, is it not a mere arbitrary selection, and can it be made anything else? This seems to be the test, as laid down by the latest expositions of this court; and we submit that upon the doctrine of classification on which the State of Texas depends for a favorable adjudication upon the constitutionality of these laws, the enactments must be condemned as utterly unreasonable and purely arbitrary. Why should the farmer and stock raiser be entitled to special privileges in the conduct of their business, and the same privileges be denied to the shoemaker and the mechanic? Why should the laborer be allowed to combine for the purpose of promoting his wages, while the professional man is made a felon if he attempts to exercise the same privilege?

The agricultural products of the farmer constitute the annual increment or income resulting from his labor, and may be classed as his annual revenue. The same may be said with reference to the annual production of the stock raiser. Why should these classes be permitted to combine with the world in any manner they deem fit for the purpose of raising the prices of their products, while the cabinetmaker, carpenter and shoemaker are denied the right of combination for similar purposes with reference to the products of their skill and capital? If any reasonable ground exists for such legislative discrimination, it has never occurred to counsel for plaintiff in error, nor has

it ever been furnished, after a protracted and tedious litigation, by counsel for defendant in error. It has been sometimes urged that the whole community was interested in the prosperity of the farmer and stock raiser, in that the prosperity of all other classes in an agricultural community, like Texas, rests alone upon the prosperity of these two classes. While this is not altogether true, it is a sufficient answer to say that the necessaries of life to all classes must come from agricultural products and live stock at one time in the hands of the original producer or raiser. The bread and meat we consume and the clothing we wear are dependent for supply upon this source. Can it be to the interest of a community that these necessaries of life, by combination, should be promoted in price so as to make them inaccessible to the masses of a community who are unable to buy them? This question can have but one answer from a reasonable standpoint. The public in every community is interested in the cheapening of the necessaries and comforts of life, so as to bring them within the reach, as far as possible, of all classes. Agricultural products, by reasonable construction of legislative intention, must include market products, such as vegetables, meat, milk, butter and eggs, which are found daily upon the tables of all classes. Is it to the interest of a community or of a state that these table necessities should command a high price caused by trusts and combinations organized for the purchase and sale of such products? Or is it to the interest of the community and state that such products should find their market on a level with all other productions in the community and be regulated solely by supply and demand? And, going a step further, and replying to the argument that doubtless will be urged before the court, that there could be effected no combination in agricultural products and live stock, does not the history of each community in the United States refute the position, and has it not occurred in almost every community in the United States that these combinations have been effected with reference to the products of market gardens and country produce, not only

as between dealers, but as between producers? We therefore submit the proposition contained in the first error assigned by plaintiff in error, with perfect confidence that this court must hold that the enactments in question do discriminate between citizens and do deny to certain citizens and classes of citizens the equal protection of the laws.

II.

It is assumed, and we have hitherto discussed the question upon that basis, that defendant in error will contend that the acts in question do provide for a classification, and that such classification relieves *ipso facto* the enactments from constitutional question. Prior to the decision of the Ellis case by this court, the Supreme Court of Texas held in effect that the provisions of these statutes constituted a classification which was within the legislative power, and that therefore they were not obnoxious to the Fourteenth Amendment. (Anheuser-Busch Co. v. Houck, 30 S. W. Rep., 869; Anheuser-Busch Co. v. Houck, 27 S. W. Rep., 696; Texas Brewing Co. v. Templeman, 38 S. W. Rep., 27; Fuqua v. Brewing Co., 38 S. W. Rep., 29). Indeed the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in the case now before the court, reiterates the doctrine, notwithstanding the decision in the Ellis case, and practically holds that in the matter of classification, state authority is unbridled (R. pp. 167-169). In the Ellis case (165 U. S., 150) this court has held that while as a general proposition it is undeniably true that if a state enactment dealt alike to all of a certain class, it was not obnoxious to the charge of a denial of equal protection, yet it was equally true that such classification could not be made arbitrarily, and that arbitrary selection could never be justified by calling it classification; and the court in its opinion, added, that no duty rested more imperatively upon the court than the enforcement of those constitutional provisions intended to secure that equality of right which is the foundation of every free government. Looking, therefore, further at the acts, the question arises most

pertinently, "are all persons brought under the influence treated alike under the same conditions?" Does not the suggestion immediately arise that particular classes of agriculturists and stock raisers are favored, while others of the same class are discriminated against? Does it not appear from the face of the enactment that agriculturists and stock raisers who confine their dealings exclusively to their own products, are allowed to combine between themselves or with others for the purpose of enhancing the market values of the fruits of their labor, while other agriculturists and stock raisers coming clearly within the same classes, are denied this privilege? Many of the agriculturists of Texas are tenants, and it is frequently the case that the land owner, who is himself a farmer, rents his lands for money rents, that is, for a certain sum per acre in cash, to be paid by the tenant at or toward the conclusion of the agricultural season. Who is the original producer in that case, the farmer or the tenant? Evidently the tenant, and the farmer is debarred the classification of an original producer, and must come within the penalties of the law. Or, carrying the example further, the farmer owns his lands, he hires his laborers and at the end of the agricultural season, and by mutual agreement, he pays them for their labor in the products of the soil instead of cash. Who is the original producer in that instance? Evidently not the laborer, but the land owner, and though the farmer may have sweated over the product for a year, yet not being the original producer or raiser, but a mere hireling, if he receives his pay in the products of the soil, and then in order to enhance their price or market value, makes any sort of combination, he becomes a criminal. Similar examples can easily be adduced with reference to the ranch owner and his labor, and other illustrations might be multiplied indefinitely as applicable to various avocations in life; but such illustrations are hardly necessary with this court, as they occur readily to the mind of the professional reader immediately upon an inspection of these two statutes. As a fact, therefore, it may be assumed that the legislation

in question does not apply to particular bodies or associations, nor to particular classes, and all persons brought under their influence are not treated alike under the same conditions and circumstances. These statutes constitute a legislative attempt to favor certain classes *of property*, constituting the annual earnings of some portions of two certain classes, and to discriminate in the most invidious manner against the earnings of all other classes. To assert that such legislation does not contravene the Fourteenth Amendment to the Constitution of the United States, is to say that the underlying principles in our government must be ignored, set aside, and defied at the arbitrary caprice of any state legislature. This principle of equality before the law was not established by the Fourteenth Amendment, but was simply recognized and emphasized thereby. That all men were created free and equal was announced in America in 1776, and it has always been a doctrine firmly adhered to by our English ancestors Mr. Justice Catron, of this court, and long before he honored this bench, laid down an exposition of this doctrine many years anterior to the Fourteenth Amendment, in words that should be engraven on the minds of every patriotic law-maker. (See Wally v. Kennedy, 2 Yerg., 555; Van Zant v. Waddell, 2 Yerg., 270-271). This court has said in Barbier v. Connally (113 U. S., 27):

"These provisions are undoubtedly intended that there should be no arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for hte protection of their persons and property, and prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid

upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as prescribed to all for like offenses."

All property in the state is entitled to equal protection. The earnings of the mechanic, and of the professional man should receive the same favor and protection as the earnings of the farmer or the stock raiser; and discrimination may be as potent against the citizen in the direction of his property as if aimed directly against himself personally. The right to hold, enjoy and dispose of property upon equal terms with his neighbor and to make all necessary agreements and contracts with reference to it, which may be believed by the owner to be for his betterment equally with such right enjoyed by his neighbor, constitute the most essential principles of American liberty. With some citizens these rights are taken away by these statutes; with others they are promoted.

III.

The statutes in question are further violative of the Constitution of the United States because they in their natural operation and effect deprive many citizens and persons of their property, without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens; and they take from many persons and citizens their rights of property by mere statutory enactment without due condemnation, according to the law of the land.

Slaughter house cases, 16 Wall., 30.
Bertholf v. O'Reilly, 74 N. Y., 515.
People v. Marx, 99 N. Y., 377.
People v. Gillson, 109 N. Y., 389.
R'y Co. v. Jacksonville, 67 Ill., 37.
Hey Sing Eich v. Anderson, 57 Cal., 251.

Lakeview v. Cemetery Co., 70 Ill., 192.
Match Co. v. Roeber, 106 N. Y., 473.
Chemical Co. v. Chemical Co., 64 Fed. R., 946.
Tiedeman Police Power, pp. 223 and 224.

The special vices of the two acts under this assignment are as follows:

Section 11 of the act of 1889 reads as follows.

"That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity."

The act of 1895, section 11, contains the same provision.

One of the most sacred rights of liberty is the right of contract, and all rights of contract which are necessary for the carrying on of business affairs, are protected by the Constitution, and are incapable of restraint by legislative action. This right of contract embraces the formation of business relations between citizens, and any citizen may form business relations with whom he pleases, and in the conduct of such business they have an inalienable right to fix and limit the character and amount of business they propose to transact, to select parties with whom they propose to deal, and to fix the prices at which they intend to buy or sell. As said by Tiedeman in his work on limitations of the police power:

"It is part of the national and civil liberty to form business relations free from the dictation of the state; that a like freedom should be secured and enjoyed in determining the conditions and terms of the contracts which constitute the base of the business relation or transaction. It is, therefore, the general rule that a man is free to ask for his wares, or his services, whatever price he is able to get, and others are willing to pay." (p. 233).

"A man has a constitutional right to buy anything in any quantity, provided he uses only fair means, and sets his own price on it, or refuses to sell it at all. And what one man may lawfully do, as an individual, two or more may

also do when combined as partners. Combinations for business purposes is legal. Combinations are beneficial as well as injurious, according to the motives or aims with which they are formed. It is, therefore, impossible to prohibit all combination. The prohibition must rest upon the objectionable character of the object of the combination. If there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

The constitutional privileges which protect the citizen in his liberty and property, entitle him to raise, produce, or manufacture; to increase or reduce the amount of his products; to fix and limit the prices at which he will buy and sell; to bargain with others as to prices; and to enter into all contracts usual and necessary in the ordinary avocations of production and trade. Government cannot limit these natural privileges, and any law which undertakes to abolish these rights, the exercise of which does not involve infringement upon the rights of others, or to limit their exercise in legitimate callings, is not within the police power. The Legislature cannot under pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning the health, safety, or welfare of society, and the courts may examine into and annul such legislation. (67 Ill., 37; 57 Cal., 251). If the prosecution of a particular calling or occupation threatens damage to the public or to individuals; it is a legitimate subject for public regulation, to the extent of preventing the evil; but it is strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulation. (70 Ill., 192). It is likewise a judicial question whether the particular

police regulation extends beyond the threatened evil, and prohibits that which involves no threatened danger to the public. The state certainly has the power to prescribe regulations deemed promotive of the health, peace, morals education and good order of its people, and to so legislate as to increase industries, develop resources, and add to the general wealth and prosperity Sometimes legislation of this character, having these objects in view, must obtain in certain districts, and special burdens are sometimes necessary to be imposed for general benefits, such as supplying water, preventing fires, lighting districts, cleaning and grading streets, opening parks, and many other like objects. Occasious for these purposes may press with more or less weight upon one than upon another, but their design is not to impose unequal and unneccessary restriction upon any one, but to promote the general good with as little inconvenience as possible. Though in many repects, special and discriminative in their character, under proper limitations, they do not furnish just ground of complaint, if they operate alike upon all persons and property under similar circumstances and conditions. The state, in the exercise of its police power, may sometimes exempt certain classes from the operation of a general law, but the case at bar furnishes the only instance within the knowledge of counsel for appellee, in which the state has attempted to confirm, by general law, certain privileges to favored avocations, and has denied the other classes a right to exercise such privileges. It is the first recorded instance of legislation, in which the state has said to two or three classes: "Go, combine with the world if you desire, raise prices by such combination to any figure; the higher the better; rob the customer ad libitum in the absolute necessities of human existence, and the greater the robbery, the better for the people. I will be a guide and a shield to you by day and by night;" and in the same breath, the state has decreed that if any one, outside of confew favored classes, shall dare exercise their rights of contract with reference to property, which adheres to them

as a part and parcel of their natural liberty, just as it does with the select classes, they shall be anathema.

These legislative acts are not addressed to the suppression of unreasonable and oppresive combination, but to any kind, reasonable or unreasonable; and such is their interpretation by the Supreme Court of Texas. They embrace combinations between two or more persons, and hence include common partnerships. They denounce alike combinations between small capital and a minimum ot skill, equally with large capital and a maximum of skill. It is made criminal for any two persons to combine as partners, corporations or otherwise, in ordinary business, to increas or reduce the price of their commodities; to fix a standard of prices: to limit or reduce the production of commodities; to limit competition between them; to make any agreement in relation to the price of an article, so as to preclude free and unrestricted competition between themselves, or between themselves and others; and to create and carry out any restrictions in trade. If marriage may be considered a business venture, as it undoubtedly is by gradual development, then is matrimony made criminal by these acts, for it certainly prevents competition between the contracting parties, even if it does not limit production. One of its objects is to reduce or increase prices and to fix standards. A and B agree to combine their capital, skill and acts in an ordinary business co-partnership for the purpose of manufacturing and dealing in certain articles. They must necessarily determine in advance the extent of production, and the prices at which they propose to sell, and thus fix a standard of prices, below which they agree not to sell. This is a crime under this act. They fix a figure on which they commence sales, and agree to graduate prices according to the cost of production. This is likewise a crime. In the vicissitude of trade, they are compelled to lower prices in order to meet competition. This is also a crime. The cost of production may advance, to meet which, they agree to advance

prices. This is a felony. Stock accumulates and trade languishes, and in order to do any business they agree to reduce prices. Again they are denounced as felons by these acts. And yet, the right to combine, to form partnerships and joint stock associations, and to agree as to production and prices, is not oppressive to the public nor unjust to the individual, nor contrary to public policy. It is an essential right, as part of the liberty of the citizen, of which no Legislature can deprive him; and that an ordinary business co-partnership is rendered criminal by this act, is apparent from the concluding portion of section 1, which forbids any two or more persons from combining together their capital, skill or acts, for the purpose of keeping any commodity at a fixed or graded figure, or by which they shall agree to unite any interest they may have in the sale or transportation of any article or commodity, so that its price might in any manner be effected. (Secs. 1 and 5). The same inhibition applies to members of a corporation, for such membership certainly excludes all idea of competition between individuals composing the body corporate; and yet the laws of Texas authorize the formation of corporations for numerous business purposes. Can it be that the same statute book contains a law imposing the penalty of felony upon all individuals who may enter into such associations? Corporations constitute the basis of our present economic civilization, and so permeate and control the business world, as to make their present existence an absolute necessity to mankind. Any interference with their natural operations, by way of prohibition, infringes at once upon the liberty of the citizens, who, under legal sanction, have a right to deal with and through such agencies, and by lawful methods have made them the chief hand-maiden of an ever advancing and developing cicilization. If they do wrong, they ought to be punished, but Texas ought not, at least, by a single enactment, to abolish them from the face of the earth. Restrictions in trade are not always hurtful, and competition is not always a public benefaction. Excessive competition almost in-

variably results in actual injury to the public. The right to combine for ordinary business purposes, and as a consequence, to fix prices and charge them according to varying conditions, and to limit or increase production according to business exegencies, constitute in great part. the liberty of the citizen, and legislation treads upon dangerous ground when it attempts to limit or abridge the right of private contract. Such legislation, to be valid, must always carry with it the essential sanction of reasonableness, and if it oversteps this established boundary, it comes in immediate conflict with the liberty of the citizen, and sooner or later disappears from the statute book as an utterly worthless thing. These Texas acts reach the acme of absurdity by making penal any agreement for the purpose of reducing prices to the public; and all the regulations attempted are not only unreasonable in their scope and purpose, but utterly subversive of fundamental principles, and collide in their absolute recklessness with the Constitutions of both nation and state. They should be weighed in the balances and found wanting. The property rights of citizens, not only of Texas, but of other states, and of the United States, are involved in this issue. Many of them have made lawful and reasonable business contracts, upon the faith of which they have expended large sums of money, relying upon that protection in such ventures that the law always affords. To their surprise, the unreasonable provisions of this legislation have been applied to their ventures in trade, and their property has been taken from them, under section eleven of these acts, by a refusal of the courts to enforce their contracts. They have dealt with their property as they saw citizens of Texas dealing with their property, and naturally supposed that they were living under a government of equal laws. and that they could not be deprived of their property except by due course of the law of the land. They have discovered, however, that the arbitrary provisions of these statutes, and the unconstitutional regulations enacted, are applied to them, and that their contracts have been held "absolutely

void and not enforceable either in law or equity." The court is asked to right these wrongs and to again vindicate the liberty of the citizen from arbitrary spoilation, and to measure the same justice to an outsider that this ill-considered and unconstitutional enactment to the farmers and stock raisers of Texas.

IV.

Said statutes are violative of the Constitution of the United States, for the further reason that they assume the power of the state to deny to every foreign corporation the right to do any business in Texas, inter-state or otherwise; and the attempt of the trial court sanctioned, by a ruling of the appellate tribunal, by judicial limitation to restrict the operation of said statutes to local business alone, did not relieve the statutes of the vice of unconstitutionality, because such action was beyond judicial power.

U. S. v. Reese, U. S., 214, 221.
Trade Mark Cases, 100 U. S., 82.
U. S. v. Harris, 106 U. S., 629.
Baldwin v. Frank, 120 U. S., 678.
Postal Telegraph Co. v. Adams, 155 U. S., 696.
Allgeyer v. La., 165 U. S., 578.
Leisy v. Hardin, 135 U. S., 100.
Schollenberger v. Pa., 18 Sup. Ct. Rep., 757.

Section 4 of both the act of 1889 and of 1895 reads as follows:

"Section 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the District Court of Travis County in the name of the State of Texas."

This action was brought by the State of Texas by authority of and in conformity with the provisions of this

section. The prayer of the state in its petition was for a temporary injunction and that upon final hearing, the same be perpetuated and a decree and judgment rendered canceling the permit of the Waters-Pierce Oil Company to do business in Texas, and prohibiting it from doing *any* business in said state, either by itself or through its officers, managers, agents or representatives (R. p. 23). After the point was raised by plaintiff in error, in the trial below, that this particular provision of said statutes was violative of the Constitution of the United States, which point was raised upon argument and by motion in arrest of judgment (R. pp. 63-4), the court proceeded to render judgment upon the verdict wherein it was ordered, adjudged and decreed that the defendant, the Waters-Pierce Oil Company be, and was thereby denied the right and prohibited from doing any business within this state; but afterwards the judgment contained this provision:

"Nothing herein shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in inter-state commerce within this state." (R. pp. 41-42).

The point was saved by bill of exceptions No 3 (R. p. 63) and was presented by due assignment of error in the Court of Civil Appeals of the State of Texas (R. p. 150, section 18); and that court, in its opinion, held that the judgment contained no error as assigned, and that it was competent for the court to enter the judgment as set forth, and thereby limit the operation of the statutes so as to relieve them from any seeming unconstitutional feature (R. p. 77). This error of the courts below is again reassigned in this court (R. p. 24). The Court of Civil Appeals, in the delivery of its opinion, labored under the impression that except where the foreign corporation is in the employ of the federal government, or is engaged strictly in matters of inter-state commerce, they were not entitled to any rights or privileges except those which might be conferred upon them as an act of grace by the state. (R. p. 178). Notwithstanding this court has held

in the Postal Telegraph Co. v. Adams, sup., that a state could not exclude from its limits a corporation engaged in inter-state commerce, either directly in terms, or indirectly by the imposition of inadmissible conditions, a further inspection of the opinion of the Court of Civil Appeals will indicate that such court was under the impression that when a foreign corporation located itself in the state and sold its articles of commerce, even in unbroken packages, that it became a local dealer and amenable to sate authority.

However that may be, and it is not necessary to discuss the issues incidentally raised by said opinion, the provisions of section 4 of the two acts of 1889 and 1895 are manifestly violative of the Constitution of the United States; and the efforts of the Texas courts in their attempts to validate the provision by the elimination of such features as were manifestly unconstitutional, must prove abortive. This court has held that it does not lie with courts, by judicial construction, to limit the operation of a statute only to those matters which the state might rightfully prohibit and punish. The statutes must be taken as they are written and a court is not able to reject a part which is unconstitutional, and retain the remainder, because in the special instance at bar, it is not possible to separate that which is unconstitutional from that which is not. Language could not be more explicit than that employed in section 4 of these two acts. "Prohibited from doing any business within this state" certainly comprehends every character of business, inter-state as well as local. It cannot lie with the courts in the construction and administration of these statutes to eliminate any feature thereof by holding that the Legislature did not intend to say what they actually did say, and that it intended only to prohibit the offending foreign corporation from doing any local business in Texas, for such is not the language of the law-making power. The Legislature has said "any business", and it must be considered that they meant what they said. This being the case, the effort of the trial court,

by its judgment, to so qualify the statute as to relieve it of its unconstitutionality, must be imputed to a vain imagination.

In U. S. v. Reese (92 U. S., 214-221) which arose upon a proper construction of the third and fourth sections of the act of May 31st, 1870 (16 Stat., 140), this court held that as these sections were in general language broad enough to cover wrongful acts as well as within the constitutional jurisdiction of courts, they could not be limited by judicial construction so as to make them operate only on that which courts might rightfully prohibit and punish. In delivering the opinion of the court, Mr. Chief Justice Waite said:

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully de detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative branch of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must annul its encroachments upon the reserve power of the states and the people."

In the Trade Mark Cases (100 U. S., 82-99) this court has held to a similar effect. This case arose upon the legislation of Congress in regard to trade marks, and because the statutes, sections 4 and 5 of the act of 1876, as well as section 4937 of the Revised Statutes, did not in their terms restrict the penalties prescribed within the limits of federal power, this court held that the acts in question were unconstitutional and void, because they embraced too much, the holding of the court being that such legislation, by its language, embraced and was intended to embrace all commerce, including that between citizens of the same state, as well as commerce with foreign nations and among the several states and with the Indian tribes, thereby presenting the same question now under discussion. Mr. Justice Miller, in delivering the opinion of the court condemning such legislation as extra-constitutional, and the inability of the courts to relieve the statutes by construction and interpretation of this unconstitutional feature, was equally emphatic in the language employed. The opinion says:

"It has been suggested that if Congress has power to regulate trade marks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases and no further. To this there are two objections. First, the indictments in these cases do not show that the trade marks which are wrongly used, were trade marks in that kind of commerce; secondly, while it may be true that when one part of the statute is valid and unconstitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in U. S. v. Reese (92 U. S., 214). In that case, Congress had passed a statute

punishing election officers who should refuse to any person lawfully entitled to do so, the right to cast his vote at any election. This court was of the opinion that as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color or previous condition of servitude. It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial; but the court said, through the Chief Justice, "we are not able to reject a part which is unconstitutional and retain the remainder because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be obtained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question then to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. To limit this statute in the manner now asked for, will be to make a new law, not to enforce an old one. This is no part of our duty. If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before the body, it would be unwilling to do, viz: make a trade mark law which is only partial in its operation and which would complicate the rights which parties would hold, in some instances under the act of Congress and in others, under state laws."

In Baldwin v. Franks (120 U. S., 678), which case arose upon the conspiracy acts of Congress, the court, in holding certain sections of said act unconstitutional as beyond the power of Congress, and speaking through the Chief Justice, said:

"In support of this argument, reliance is had upon the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional, rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation so that each may be read by itself. This statute, considered as a statute punishing conspiracy in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. * * * It provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws or equal privileges or immunities under the laws. A single provision which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens. Those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought, must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.'

To the same effect see also U. S. v. Harris (106 U. S., 629). It occurs to counsel for plaintiff in error that these authorities are conclusive as to the constitutionality of section 4 of these two Texas statutes. As said before, this particular section has no parts within the meaning of the rule, and is, therefore, incapable of separation. They provide in general terms for the punishment of foreign corporations, which punishment consists in denying them the right to do any business in Texas. A single provision makes up the whole section, and the limitations made by the courts below were made by construction and not by separation. In the particular case at bar, the court below was asked and assented to the request, not to separate parts of a statute which might be constitutional, from other

parts which were manifestly unconstitutional, but to qualify the statute by judicial construction; to introduce words of limitation so as to make the statute specific and limited in its operation; in plain language, to make a law, and one which the Legislature of Texas never enacted. The fact that the limitation engrafted by the court upon the statute renders it practically impotent for mischief, does not relieve the dilemma, nor does it justify the court in its action, or validate the statute. We may assume from the decisions of this court, that a state cannot interfere with inter-state commerce in any manner, and upon this assumption, we think we hazard nothing in asserting that with this knowledge before the Texas Legislature, section 4 would never have been engrafted in these two acts. This section 4 is the basis of the action at bar. The proceeding of the state to forfeit the right of plaintiff in error to do business in the State of Texas, is based exclusively upon this section. The officers of the state, in asking a remedy, prayed the remedy invoked by the statute. Without section 4, the state had no case, and there was no law upon her statute books justifying this action. It, therefore, became fundamental to inquire into and determine, under the rules of law, whether or not section 4, by reason of its invasion of federal jurisdiction, became and was null and void. The judgment rendered by the court is a confession that section 4, according to its plain intent and meaning, was unconstitutional. This court has held, in repeated decisions already cited, that such defect could not be remedied by judicial construction, but that it belonged to the law-making power of the state to change the enactment and to adapt it to constitutional limitation. The Texas courts have attempted to do that which is forbidden by the decisions of this court. Their work is in the record, and cannot be controverted. The work is idle. The statute is unconstitutional, and we submit that nothing remains for this court but to say so and follow its own decisions.

V.

Said statutes of 1889 and 1895 are further violative of the Constitution of the United States, because they usurp and were intended to usurp the authority and jurisdiction of the United States, and the other states of the Union, in the mater of prosecution for acts occurring beyond the territorial limits of the State of Texas.

Dealy v. U. S., 152 U. S., 539-547.
U. S. v. Britton, 108 U. S., 199-204.
Black on Const. Law, Desty's Criminal Law, Sec. 55.
U. S. v. Boothe, 21 How., 524.

Both acts, hereinbefore set forth at length, contains this provision:

"Section 9. Persons out of the state may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission, necessarily require a personal presence in this state, the object being to reach and punish all persons offending against its provisions, whether within or without the state."

A citation of the authorities above suffices to demonstrate the absurdity of this section, and its manifest attempt on the part of Texas to grasp jurisdiction not rightfully belonging to it. We content ourselves, therefore, with a mere statement of the proposition and authorities, adding in conclusion the opposite language of this court in an opinion delivered by Chief Justice Taney:

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence" (U. S. v. Boothe, 21 How., 524.).

VI.

The court below erred in holding, with the trial court, that the case at bar was a controversy of a civil nature and in approving the ruling of the court below, in refusing to instruct the jury, upon request by the plaintiff in error, that if upon all the evidence, the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in its features, and not a controversy of a civil nature.

In presenting this assignment of error, plaintiff in error is aware that under the rulings of this court, decisions of state courts are final in matters of procedure.

Oxley Stave Co. v. Butler Co., 166 U. S., 648.
Eagan v. Hart, 165 U. S., 188

We are also aware that on this writ of error the court must take the facts as found by the jury and can only consider whether the statutes involved, as interpretated to the jury, are in violation of the federal constitution. (M. K. & T. v. Haber, 18 Sup. Ct. Rep., 489).

The fact, however, that this assignment involves the very fundamental nature of the case, may take it out of the operation of the general rule. The court will recall what is already stated in the foregoing pages of this brief, that certain leading features of the case were eliminated on the trial by the judge of the court. The principal element of the state's complaint, as manifested from its petition, was the alleged combination between the Waters-Pierce Oil Company and the Standard Oil Trust, organized in New York City in January, 1882. From failure of proof, this feature was withdrawn from the jury by the trial judge. (R. p. 48). Other leading features of the combination, such as the purchase by the Waters-Pierce Oil Company of the Eagle Refining Company, and its employment of C. W. Robinson, J. L. Lewis and Stillwell Brothers on the pur-

chase by the plaintiff in error of the business of said concerns, were likewise withdrawn on the ground that the same were no violations of the laws of Texas. (R. p. 48). This left only four or five alleged transactions the subject of complaint between plaintiff in error, acting through its local agents in Texas, and certain dealers in oils in the State of Texas and it became a material inquiry as to guilty participancy on the part of the plaintiff in error with the acts of its agents, among many other instructions relating to the law of agency, all of which were refused. (R. p. 55). The court charged the jury, as in ordinary civil cases, that the burden of proof was on the state to show by a preponderance of evidence, the facts necessary to entitle it to recover. (R. p. 49).

The case being essentially one of a criminal nature, reasonable doubt should have been charged.

U. S. v. The Burdette, 9 Pet., 682.
Chaffee v. U. S., 16 Wall., 516.
Boyd v. U. S., 116 U. S., 610-637.
Wisconsin v. Ins. Co., 127 U. S., 265.
U. S., v. Shapley, 4 C. C. A., 237 (54 Fed. Rep., 126).
G., C.& S. F. R'y Co. v. Dwyer, 84 Tex., 194.

We submit the case, and ask that the judgment of the Texas courts be reversed, and the case remanded, with directions to the courts below to dismiss the suit on the ground of the unconstitutionality of the statutes upon which the prosecution is based.

John D. Johnson
Geo Clark
O C Bolinger

Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 334.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

We propose to argue one only of many questions arising in this case. We contend that the Acts of March 30th, 1889, and of April 30, 1895, of the State of Texas :

I. *Make penal all association of two or more persons for business purposes.*

II. *Render it impossible for two or more persons associated to carry on business*, and

III. *That the right of persons to associate and carry on business is one of the liberties protected by the Fourteenth Amendment to the Federal Constitution.*

The acts define a trust as follows:

> "A trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any or all of the following purposes."

The words "combination of capital, skill or acts" embrace every method by which men can associate in business, whether by partnership, corporation, joint-stock association or by contract of any nature.

Parsons on Partnership (3d Ed., p. 6) thus defines a partnership:

> "The combination, by two or more persons, of capital labor or skill, for the purpose of business for their own benefit."

In 3 Kent's Commentaries (p. 23) partnership is defined as:

> "A contract of two or more competent persons to place their money, effects, labor or skill, or some or all of these, in lawful commerce, or business, and to divide the profit and bear the loss in certain proportions."

In 1 Lindley on Partnership (4th Ed., p. 3) will be found a number of definitions, all agreeing that partnership is a joinder by persons of capital, skill or acts in business, with a sharing of the common profits.

The combinations of capital, skill or acts by two or more persons, which the act condemns, includes, then, all partnerships, corporations and associations of any nature, having in view either, any or all of certain enumerated purposes.

In order to demonstrate that the act makes criminal all association for business purposes, it is only necessary to show that *one or more of the enumerated purposes is essential to every business association, whether partnership, corporation or joint-stock association, being*

so necessary a factor of the combination that the existence of the one implies the existence of the other.

PURPOSE—This renders it necessary to consider what the law regards as a "purpose." A purpose is a mental state, an intent, a design. Every man is *prima facie* supposed to intend every necessary or even probable or natural consequence of his own act.

> "If there be infraction of the law the intention to break the law must be inferred. * * * A man must be taken to have had the intention implied from the act."
>
> Broome's Legal Maxims, 7th Ed., p. 307.

If, for illustration, the effect of every combination is necessarily and naturally to prevent competition, the law must infer that such was the purpose of the combination, and it matters not whether this was the main purpose, a subsidiary purpose, or only a necessary consequence. As is well said in Bishop on Criminal Law, Sec. 337:

> "In the affairs of life it is seldom a man does any one thing, prompted by one motive alone, to accomplish one end. * * * Suppose, then, a man has several intents and in pursuance of them together moving him does what the law forbids. The rule here is, that, if there are the intents necessary to constitute the offense, and intents not necessary, the latter do not vitiate the former, which in their consequences are the same as though they stood alone. Thus, under the English statute against demolishing houses, if one object of a mob attacking a house is to injure a person in it, yet if another, and even inferior object, is to demolish the house, the offense is committed in consequence of this inferior intent."

Hence, if the main purpose of a partnership is to carry on a business, yet if the combination of persons as partners necessarily and naturally prevents competition between them, or violates any other of the pro-

visions of the act, that also, in contemplation of law, is a purpose of the combination.

The *purpose* must in any case be established by the *effect*. The act itself uses the words "purposes" and "effects" in the same sense. Section 7 provides that "*in any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination.*" The fifth clause of Section I. specifies one of the criminal purposes as follows: "to make and enter into, or carry out, or execute any contract;" and then follows a specification of numerous contracts which are made criminal. It is evident, then, that under this act a contract at any time entered into of the nature specified is to be considered one of the purposes of the combination. The mere entering into a contract by two or more persons forms a combination (for a contract is a combination), and the fact that they have made or carried out a forbidden contract whether express or implied is all the evidence of purpose required.

This is in accordance with the construction of the act by the Supreme Court of Texas. In Queen Insurance Co. vs. Texas, 86 Texas Rep., 250, GAINES, A. J., says: "A contract between two or more to do a thing is a 'combination of acts' of such persons to bring about the performance of the contract."

And in Texas & Pacific Coal Co. vs. Lawson, 89 Texas Rep., 398, DENMAN, A. J., says:

> "The portion of the act above quoted denounces as void and prohibits the enforcement at law or equity of every contract whereby a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities."

In the same case he says:

> "The word 'combination' as used in the statute means union or association."

It is manifest, then, that the act makes criminal the doing by two or more persons of any of the things specified as "purposes," and also the entering into or the carrying out by two or more persons of any of the contracts, obligations or agreements specified in clause 5 of Section I.

The things made criminal by the act as amended, whenever participated in by two or more persons, are as follows:

> "First, to create or carry out restrictions in trade or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of the State; second, to increase or reduce the price of merchandise, produce or commodities; third, to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities or to prevent competition in aids to commerce; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State; fifth, to make or enter into or carry out or execute any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others, to preclude a free and unrestricted competition, among themselves or others, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest that they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected."

I. We now call attention to the prohibitions which we claim prevent all association of two or more persons in business, to wit:

A. Combinations of capital, skill or acts of two or more persons which prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or in aids to commerce.

B. The making or entering into or carrying out or executing any contract, obligation or agreement of any kind or description by which (two or more persons) shall in any manner *preclude a free and unrestricted competition among themselves* or others in the sale or transportation of any article or commodity, or by which

C. They shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

We do not claim that the act is unconstitutional because it makes criminal the union of capital, skill and acts which create restrictions in trade. That question has been settled by the cases of the United States vs. The Trans-Missouri Freight Association, 166 U. S., 190, and United States vs. The Joint Traffic Association, 171 U. S., 505. Our first claim is that the act is unconstitutional because it makes criminal contracts between two or more persons which "prevent competition," or which "preclude a *free and unrestrained competition among themselves* or others" and prevents the "union of any interests" which might in any manner affect prices.

Contracts "in restraint of trade" have so often been passed upon by the courts that they are now defined with some accuracy, and little doubt may be felt whether any given contract falls within the definition. But a contract "in restraint of competition" and particularly contracts between two persons which "preclude a free and unrestricted competition among themselves" are quite different from contracts in restraint

of trade. It is said by Justice PECKHAM in The United States vs. The Joint Traffic Association, 171 U. S., 505, 567 :

> " Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade."

It is certainly not difficult to show, however, that all such contracts are in restraint of competition and preclude a free and unrestricted competition between the persons entering into them.

How can there be association without prevention of competition between the persons associated ? What is competition ? It is the act of striving to gain what another is striving to gain at the same time. It is rivalry in the pursuit of the same object. In business, persons who are striving to secure the same customers for the same class of goods are competitors, and the means used to secure customers is competition. If they enter into any alliance by which they cease to be rivals, they are no longer competitors. If two who are in competition agree among themselves not to sell to the customers of the other they have restricted competition between themselves. So, also, if they agree as to the prices at which they will sell. But, more effective than all, if persons agree to unite their capital, skill or acts in co-operation in the same object and to divide the profits received, they thereby absolutely preclude competition between themselves. Instead of beings rivals they become associates. Instead of each striving to obtain his ends at the expense of the other, they work in harmony for an end which will mutually benefit them. Yet, this is an ordinary partnership. In fact, association is the antithesis of com-

petition, and all association of persons in business, whether as partners or corporators, prevents competition.

It is usual in articles of copartnership to stipulate that each partner shall devote his time and attention to the business of the firm, and shall not engage in any business in competition with the firm. This is an agreement to prevent competition, but even if no such agreement is entered into between the partners, the law implies it.

> "The first and highest duty which partners owe each other is that of perfect good faith. A partner must do what he can to promote the prosperity of the firm." * * * "It is quite well settled that a partner has no right to carry away his knowledge, his skill, his capital or his credit, his care or labor into another business, whether only his own, or that of another firm, to the injury of his first copartners. That is, he may not do this in such a way as to deprive them of business, of profits or advantages, which they had a right to expect from their connection with him."
>
> *Parsons on Part.*, 4th Ed., Sec. 153.

Undoubtedly the circumstances might be such, or the copartnership agreement such, that individuals composing the firm could legally compete with the firm, but such a case is barely conjectural. It is unusual and contrary to the true intent and purpose of a copartnership, which is co-operation and not competition.

Not only do partners not compete with each other in the business conducted by the firm; it is lawful for them to agree not to compete in any business. In Matthews vs. Associated Press of New York, 136 N. Y., 333, the Court says:

> "A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who comes in must agree not to do any other business and must give up all such busi-

ness as he had theretofore done. Such an agreement would not be in restraint of trade."

It certainly would be restrictive of competition.

Partnership not only prevents competition between the persons associated but restricts competition generally. That is, it leaves fewer persons to compete, and it gives the persons combined an advantage over individuals. There is no need to argue in relation to the advantages and power of association in business. It is so marked that the business of the world is carried on by its means. It is so great that many fear the abuse of the power, and would revert to the days of individual industry before machinery made association a necessity. It is this fear that gave rise to the law now being considered, and we are certainly in correspondence with the minds of the makers of this law when we admit that combination destroys competition between the persons combined, and restrains competition in general. The legislators in the State of Texas did their work effectually. Believing that where "combination is possible, competition is impossible," they have utterly destroyed the power of combination. The generalization contained in the popular saying is entirely too broad, and the Legislature arguing from a false premise struck too deep and have deprived citizens of a liberty without which modern business is impossible.

There is no possible escape from the obvious and self-evident proposition that any association in business prevents competition among the persons associated, and that, if prevention of competition is made criminal, association is made impossible. Prevention of competition is a purpose or effect of every copartnership, joint-stock association or corporation. It is a purpose or effect of every contract, agreement or understanding by which men associate or co-operate.

Prevent men from making contracts which preclude a free and unrestricted competition among themselves,

and we are at once relegated to the savage state. If association or co-operation is forbidden, unrestricted and unrelieved warfare becomes an enforced method in business.

II. *In addition to the provisions of the act which make associations for business purposes impossible, other provisions render business by two or more persons associated impossible.*

The following, among other things, are made criminal :

1. Combination of capital, skill or acts which increase or *reduce* the price of merchandise, produce or commodities, or

2. Which limit or reduce the production of commodities ;

3. Agreements by which persons bind themselves not to sell, dispose of, or transport any commodity or article of trade below a common standard figure ;

4. Or by which they shall agree to keep the price of such articles at a fixed or graduated figure ;

5. Or by which they shall in any manner establish or settle the price of any commodity between themselves and others, to preclude a free and unrestricted competition among themselves or others ;

6. Or by which they unite any interest that they may have in connection with the sale or transportation of any article that its price might in any manner be affected.

Possibly the most startling provision of this act is that which makes criminal combinations of capital, skill and acts for the purpose or having the effect of *reducing* the price of commodities.

The provision needs no comment. It is so plain that it is capable neither of construction nor misconstruction. When it is considered how wonderfully all the commodities which are used by civilized man, and are necessary in our modern trade and commerce, have been reduced in price during the century nearing its

close by the union of the capital, skill and acts of man, we must pause in wonder before an act which makes such a union for such purposes a felony, and inflicts upon those entitled only to gratitude and respect the most infamous penalties of the law.

Without dwelling upon this provision, however, we may ask how it is possible for two or more persons to associate in business if they may neither limit nor reduce their production, nor increase nor reduce the price of their commodities, nor agree not to sell below a common standard figure ; nor to keep the articles in which they deal at a fixed or graduated figure ; nor to settle the price either as between themselves or themselves and others ; nor to unite their interest so that price might in any manner be affected.

Let us admit that the law might wisely prevent a number of large competitive concerns, engaged in manufacturing a certain commodity, from agreeing to limit or reduce the production of the commodities they manufacture, or from agreeing to increase the price of the commodities which they sell or from fixing them at any standard or graduated figure, because such agreements deprive the public of the benefit of competition and enable dealers to arbitrarily fix prices. But to establish this as a general rule applying to all persons under all circumstances produces consequences which are absurd. It forces all persons to remain competitors and prevents association of any character. If two men have the privilege of associating as partners they must have power while thus associated to limit or reduce their prices and to fix their prices at standard or graduated figures. Take away this right and you destroy their power to carry on business.

We cannot find language more forcible to describe the vicious consequences of the act than that used by Justice SWAYNE *In re* Grice, 72 Fed. Rep., 642.

> "We will assume that A and B agree to combine their capital, skill and acts, or, in other words, enter into partnership, for the purpose of manufacturing and dealing in certain

commodities. They must first necessarily determine the extent of their production, and the price at which they can sell their commodities. Having determined as near as possible the cost of their manufactured products, and the minimum profit necessary to justify the carrying on of the business, they agree that they will not sell their commodities below this common-standard figure. They fix a figure on which they commence their sales, agreeing to graduate the price, up or down, as the cost of production may vary. Finding after a time their prices too high, and that competitors are underselling their commodities, they lower their prices, and this they may do solely for the purpose of holding the market against competitors. There may be, after a time, an increase in wages, and they agree to increase their prices. There comes an era of hard times, their stock accumulates and is unsalable, and they agree to limit or reduce the production of their commodities. All this they must be able to do, or they cannot carry on their business as partners, yet every one of these agreements, arrangements, undertakings or acts are made criminal by this act. It is absolutely impossible to carry on a partnership business without violating it.

"If persons combined cannot carry on business without entering into, executing and carrying out contracts, obligations and agreements by which they shall settle the prices of any article as between themselves, or themselves and others, and bind themselves to sell their commodities at a figure, or graduated figure, and not to sell below a common standard figure, or if they cannot carry on business without raising and lowering prices, and increasing and diminishing their productions, at pleasure, then certainly all these things are purposes of their combination. Whether these are the main purposes or purposes essential to the main purposes is not of the slightest consequence."

"The vice of the act in question is that it attempts to prevent too much; it does not stop at reasonable limits; it is not content with making criminal general restraint of trade, but it makes criminal all restrictions of trade. It is not content with affixing penalties to acts or contracts which unreasonably restrict competition; it condemns any agreement or arrangement which prevents competition between two or more persons entering into it. It not only prevents com-

petitors from oppressing the public by unreasonable agreements as to production and prices; it also prevents persons associated in interest, joint owners and copartners, from making any agreement about their production and prices. It not only prevents persons from using their capital, skill and acts for the purpose of increasing prices: it reaches the very acme of absurdity in preventing persons from uniting their capital, skill and acts for the purpose of reducing prices. The Legislature perhaps had in mind that which might possibly be a means of public oppression—to wit, the forced reduction of prices of articles which the combination or partnership purchased, but the act does not discriminate between articles purchased and articles sold. And it is because it does not discriminate, because of the want of ordinary care in studying the meanings of words, that we have on the statute books of Texas at this close of the nineteenth century, during which combinations of capital and skill have cheapened the price of products to an extent unparalleled in the world's history, an act making it a highly penal offense for two or more persons to unite their capital and skill for the purpose of reducing the price of the products which they undertake to manufacture and sell."

We have confined our argument principally to the effect of the act upon association, but the Court cannot help noticing that its effects are not limited to persons associated. It prevents agreements or obligations between joint owners and like combinations of capital. Tenants in common of a farm can no more agree upon production and prices under this act than partners. But it reaches still farther. The process of bargain and sale is an agreement between two or more persons fixing a price upon commodities. If the price cannot be settled or established, the contract of bargain and sale is impossible. The prohibition of all contracts in restraint of competition likewise prohibits contracts between employer and employee, agreements for the sale of good-will and many others which might be mentioned. We will hereafter refer to a multitude of cases in which contracts have been upheld which this act makes criminal.

Legislative Intent.

It is earnestly contended by the learned counsel for Defendant in Error that the Legislature did not intend to interfere with corporations or partnerships or the right of association because by the same act it recognized their existence, and by other acts passed at the same term created others. That the act recognizes associations as already existing—a fact which could not be ignored—cannot defeat the plain language which renders their future existence penal. Neither can the plain language of a statute be altered by reference to other statutes.

This Court has often held that "where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they plainly expressed, and consequently no room is left for construction."

Fisher vs. Blight, 2 Cranch, 358, 399.
Schooner Pauline's Cargo vs. The United States, 7 Cranch, 52, 60.
United States vs. Freeman, 3 H., 556, 565.
McPherson vs. Blacker, 146 U. S., 1, 27.

And Art. 9 of the Texas Penal Code requires a penal statute to be construed "according to the plain import of the language in which it is written."

It is only when the sense is doubtful that resort can be had to the consideration of other statutes or other parts of the same statute. The rule is that in construing a *doubtful* statute, and for the purpose of arriving at the legislative intent, all acts *in pari materia* are to be taken together and examined, in order to arrive at the true result. But the statute under consideration is not doubtful, and other statutes creating corporations are not *in pari materia*. The word *par*, as was said in United Society vs. Eagle Bank, 7 Conn., 457, 469, intimates not likeness merely, but identity.

Certainly this anti-trust act is not identical with acts creating corporations, and cannot be construed with them as one act. The intent is to be derived when possible from the language of the statute, and the plain meaning of that language cannot be ignored in order to avoid unforeseen results. The act says, "two or more persons shall not make, enter into or carry out any contract, obligation or agreement of any kind or description by which they shall establish the price of any article or commodity between themselves or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity." What extrinsic aids can be brought to the interpretation of those words which will alter their plain meaning? By what rule of interpretation can it be claimed the Legislature did not intend to include certain persons when the language includes all persons, or certain agreements when the language includes "any contract, obligation or agreement of any kind or description?"

How can it be claimed that the Legislature intended to make penal only contracts in restraint of trade when in addition thereto it adds clause to clause in multiplication of crimes?

How can it be said that by "restraint of competition" is meant that general restraint of competition which has been recognized by the Courts as being in restraint of trade, when the act adds another clause thereto preventing anything which shall preclude free and unrestricted competition between any two or more persons under any circumstances?

The Court cannot construe out of the act what is plainly written in it. It cannot say that the Legislature meant that two persons might prevent competition between themselves by entering into partnership, because the act says the contrary. It cannot say the act does not make criminal such a combination of capital and skill by two persons as produces a reduc-

tion of prices of a commodity, for the act says the contrary. It cannot say that the Legislature did not intend to prevent two persons who jointly owned an article from agreeing upon its price, for the act says the contrary. Some associations and some agreements about production and price may well deserve the penalties of the law, but when the law attempts to strike down all associations and all agreements about production and prices it produces consequences which it is quite probable no legislator ever foresaw and, in that sense of the word, never intended.

The learned counsel for Defendant in Error make no attempt to justify the act if it is to be interpreted "according to the plain import of the language in which it is written." Their contention is (pages 65 and 66 of brief) that all the prohibitions of the act prohibit nothing more than restrictions in trade. This, then, is the issue upon this point. We contend that competition may be restricted without restricting trade, and in this the defendant agrees with us (page 69 of brief). We contend that agreements between two or more persons associated, fixing prices upon their commodities or increasing or reducing their prices, are not in restraint of trade. This, defendant does not deny, and the question at issue is: Does the act prohibit such agreements? We appeal to the plain language of the act.

Construction of the Act by the Supreme Court of Texas.

It is also claimed that the Supreme Court of Texas practically holds that this act does not interfere with partnerships, corporations and like associations. This is the reverse of the fact. In the earliest case arising under this act, Queen Insurance Co. vs. Texas, 86 Texas Rep., 250, GAINES, A. J., went outside of the matter at issue to show the disastrous results which

would ensue if this act was construed according to the plain import of the language in which it is written as required by the penal code of Texas, and intimated that the consequences might be so disastrous as to have a bearing on the question of intention in spite of the code provision, but the point decided was that insurance was not an "article" or "commodity," the only interpretation of the act being of the words "article," "commodity" and "trade."

The subsequent case of Houck & Dieter vs. Anheuser-Busch Brewing Association, 88 Texas Rep., 184, arose upon a partnership agreement for the sale of beer in El Paso. The partnership was held to be a combination such as was prohibited by the act. The decision was based upon the fact that the brewing company bound itself to sell beer exclusively to the copartnership in El Paso. GAINES, C. J., said it was a question whether irrespective of this feature the contract was not prohibited by the act, since the act makes no distinction between restraints which are reasonable and which are unreasonable.

In Welch vs. Phelps and Bigelow Windmill Co., 89 Texas Rep., 653, it was held that the act did not prevent a principal from agreeing with his agent about the price of consigned goods. DENMAN, A. J., says: "the purpose of the statutes was to prohibit two or more persons, &c., from uniting or associating their otherwise independent, separate and possibly competing capital, skill or acts for one or more of the five purposes therein specified." This opinion certainly indicates that a partnership formed by competitors, or possible competitors, is embraced within the act.

Texas & Pacific Coal Company vs. Lawson, 89 Tex. Rep., 394, brought before the Court a lease of a parcel of land upon which to establish a saloon, combined with the exclusive right to sell liquors upon lands of the coal company, the rental being a "sum equal to two-thirds of the net profits arising from said business monthly during the terms of this lease." This, so far

as the business of selling liquor is concerned, was purely a partnership agreement. DENMAN, A. J., after quoting from the Act, says :

> " The portion of the Act above quoted denounces as void and prohibits the enforcement at law or equity of every contract whereby a combination of capital, skill or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities. The statute ignores the common law distinction between restrictions which are reasonable and those which are not, and commodities which are of prime necessity and those which are not. The word combination as used in the statute means union or association. It is clear that the contract provided for and contemplated a union or association of capital and acts by the Coal Company and Lawson.
>
> " In order, however, for the contract to be within the inhibition of the statute the combination must have been formed for one of the purposes therein specified. Was its purpose either to create or carry out restrictions in trade or to prevent competition in sale or purchase of commodities ? The Court has held that, as here used, the word trade means traffic, and the word commodities means any movable or tangible thing that is ordinarily produced or used as subject of barter or sale. It is clear, then, that dealing in liquors contemplated by the contract is trading, and their purchase and sale is of commodities within the statute.
>
> " We are of opinion that the purpose of the combination was to create and carry out a restriction in the sale of liquors at Thurber, and also to prevent competition in the purchase and sale thereof."

Gates vs. Hooper, 90 Texas Rep., 563, arose upon a sale of a stock of goods by one merchant to another, the seller agreeing to retire from the mercantile business in Batesville and use his efforts to secure custom for the buyer. DENMAN, A. J., pronouncing the agreement not within the Act, says :

> " In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts

by two or more. Combination, as here used, means union or association. * * *

"When we consider the purposes for which the combination must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of capital, skill or acts denounced is where the parties in the particular case *designed the united co-operation of such agencies, which might have been otherwise independent and competing*, for the accomplishment of one or more of such purposes."

It follows, necessarily, from this language that if these two country merchants had entered into a partnership or other combination or association they would inevitably have subjected themselves to the penalties of the act and been liable to a possible fine of $5,000 and imprisonment of ten years for each day of the continuance of such an association. There would have been no possible way for a Court to have resisted the conclusion. Even as the case stood it was decided, in disregard of the language of GAINES, A. J., in Queen Ins. Co. vs. Texas, 86 Texas Rep., 250, 264, that "an agreement between two or more persons, by which one of them undertakes to bind himself not to follow his trade or to practice his profession in a territory of prescribed limits, is a 'combination' within the meaning of the statute under consideration."

The only other cases of which we have knowledge involving a construction of this act are Texas Brewing Co. vs. Templeman *et al.*, 90 Texas Rep., 277, and Fuqua *et al.* vs. Pabst Brewing Co., 90 Texas Rep., 298. The contracts and the decisions in both cases were essentially the same. In the former, GAINES, C. J., says:

"The contract we think is a combination of capital, skill and acts. Was the combination unlawful? By the agreement the Brewing Co. bound itself to give to Norwood & Co.

the sole representation and sale of its products in and near the Town of Navasota, and the latter placed themselves under the reciprocal obligation to sell no other beer than that of the company. The effect of the contract is evidently to create and 'carry out restrictions in trade,' and to 'prevent competition' in the 'sale and purchase' of 'commodities'—namely, beer and ice."

Take further the decision of the Courts in this case now being argued as illustrative of the construction of the act by the highest Courts of Texas. The learned Judge of the District Court, who was affirmed by the Courts above, after quoting the first section of the act, further charged as follows:

"Now, if you find from the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying and selling oils, as named and set out in plaintiff's petition since July 6th, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively for any specified time and from no other source in consideration of rebates allowed them by defendant company or for any other valuable consideration; or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all their oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company; or if said defendant company, so acting since said date, made and entered into and carried out in this State a contract with any of the parties, as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company either verbally or in writing to buy all their oils exclusively from

> defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, * * * you will return a verdict for the plaintiff against the defendant Waters-Pierce Oil Company."

The contracts stated by the Court as violative of the act are three, and may be briefly summarized as follows:

1. Contract to buy oil from one company exclusively for any specified time, for any valuable consideration.

2. Contract to buy oils from one company and not from any other source for a specified time, and not to sell said oils to persons handling competitive oils.

3. Contract to buy oils exclusively from one company, and to sell the same at a price fixed by said company.

We shall not take the time of this Court in defense of each of the contracts above stated, but will consider briefly the first one upon which the jury were authorized to find defendants guilty, to wit: A contract to buy oil from one company exclusively for a specified time for any valuable consideration.

It may seem to require a broad construction of the language of the act against prevention of competition to bring such a contract within it. If a contract by A to purchase all his supplies of a particular commodity from B for a specified time, for a valuable consideration, is restrictive of competition, it is easy to enumerate dozens of similar ordinary and innocent business contracts which are equally so. No man engaged in business can safely enter into contracts while such a law governs, lest he become a criminal. The Legislature has certainly set a net, not only large enough to catch all possible offenders, but thousands who are guiltless of any wrong. Yet we cannot say that the interpretation was too broad. There was a contract and, therefore, a combination. It prevented competition in the sale of oil to the purchasers for the time limited, which any large purchase by them would equally have

done. It settled the price of a commodity between the parties to the contract, as every contract of sale does. It was a union of interests in connection with the sale of an article by which its price might be affected. The Court being bound by statute to "adhere to the plain import of the language in which the act is written," possibly could not have charged otherwise.

It will not do, however, in view of these interpretations by the highest court of Texas to say it has defined the act contrary to its plain language as only preventive of restrictions of trade. As defined by the Court the act makes criminal contracts of the most innocent character. In Chicago, St. Louis & N. O. R. R. Co. vs. Pullman Southern Car Co., 139 U. S., 79, a contract to furnish a railroad company with drawing-room and sleeping cars for fifteen years, the railroad agreeing not to "contract with any other party to run the said class of cars on and over said lines of road during said period of fifteen years, was held to be not at all in restraint of trade." It certainly was in restraint of competition.

So, too, the contracts and arrangements held not to be in restraint of trade in the Express Cases, 117 U. S., 1, would be clearly criminal under the Texas Act.

So the arrangements as to sale of stocks pronounced in Williams vs. Montgomery, 118 N. Y., 519, 525, to be "a reasonable, just and honest purpose which the law does not condemn," was clearly in restraint of competition.

In Brown vs. Rounsavell, 78 Ill., 589, and Newell vs. Meyendorff, 9 Mont., 254, contracts to sell exclusively to one party were held good.

Scores of cases can be cited in which contracts were held legal and innocent and not in restraint of trade, which would clearly be criminal under this act. It will be sufficient to refer to the cases cited by SANBORN, J., in United States vs. Trans-Missouri Freight Association, 58 Fed. Rep., 58, 72, and to the cases hereafter cited in this argument.

It being evident, then, that the Legislature intended the plain import of the language used, and that the Supreme Court of Texas has construed the act in accordance therewith, there can be no escape from the conclusion that the act prevents all contracts, arrangements or union of capital, skill and acts which preclude free and unrestricted competition among the two or more persons so agreeing or uniting, and that persons so uniting are precluded from any understandings or agreements in relation to the prices of the articles in which they deal. We, therefore, earnestly assert:

III. *The right of persons to associate and carry on business and to enter into contracts necessary to their business is one of the liberties protected by the 14th Amendment to the Federal Constitution.*

The Constitution protects liberty of contract, except in so far as that liberty encroaches upon the liberty of others; among the rights of contract thus protected is the right of men to associate together in the conduct of business, and to unite their capital, skill or acts therein; including also the right, while thus associated, to agree upon the amount of their production, and the prices at which they will buy and sell, which necessarily embraces also the right to raise and lower the prices of the commodities in which they deal, and to keep them at a fixed price.

In Allgeyer vs. Louisiana, 165 U. S., 578, the Court, through Mr. Justice PECKHAM, says, p. 589:

> "The liberty mentioned in that (XIV.) amendment means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying

out to a successful conclusion the purposes above mentioned."

Again the learned Justice says:

"In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding or selling property, must be embraced the right to make all proper contracts in relation thereto."

It was said by Mr. Justice BRADLEY in the *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S., 746–762, that "the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again, on page 764, the learned Justice says: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." The following New York cases are important on this point.

Bertholf vs. O'Reilly, 74 N. Y., 509.
In re Jacobs, 98 N. Y., 98.
People vs. Marx, 99 N. Y., 377.
People vs. Gillson, 109 N. Y., 389.
Forster vs. Scott, 136 N. Y., 577.

In the Gilson case Mr. Justice PECKHAM, referring to the former cases, said (p. 398):

"The following propositions are firmly established and recognized: a person living under our constitution has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.

"The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the

> person of the citizen as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

There is no liberty more sacredly guarded than the right of contract. The language of *Printing Co. vs. Sampson*, 19 Eq. Cases, 462, has been adopted by several American courts.

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract."

And in the *U. S. Chemical Co. vs. Provident Chemical Co.*, 64 Fed Rep., 946, the Court says:

> "The right to contract is a cardinal element of constitutional liberty, and as such should be jealously guarded."

The courts of many States of the Union have guarded this right of contract by declaring unconstitutional acts which infringed upon it. In Pennsylvania the statute forbidding manufacturers from paying wages in orders was held unconstitutional, as being an attempt to prevent persons *sui juris* from making their own contracts (*Godcharles vs. Wigeman*, 113 Pa. St., 431). The U. S. Circuit Court in Ohio declared unconstitutional a statute preventing railroad companies from contracting with employees in respect of personal

injuries (*Shaver vs. Pa. Co.*, 71 Fed. Rep., 931). The Ohio Supreme Court held an act relating to mechanics' liens void because it interfered with the right of contract (*Palmer vs. Tingle*, 45 N. E. Rep., 313). In Illinois the Truck-store act, the coal-weighing act and other legislation has been set aside for the same reason.

Frorer vs. People, 141 Ill., 171.
Ramsey vs. People, 142 Ill., 380.
Harding vs. People, 160 Ill., 459.
Richie vs. People, 152 Ill., 98.

Legislation has been pronounced unconstitutional in other States on the same ground.

Kuhn vs. Detroit, 70 Mich., 534.
Spry Lumber Co. vs. Trust Co., 77 Mich., 199.
State vs. Loomis, 115 Mo., 307.
State vs. Julow, 129 Mo., 163.
State vs. Goodwill, 33 W. Va., 179.
Ex parte Kuback, 85 Cal., 274.
Low vs. Rees' Printing Co., 41 Neb., 127.
In re Eight Hour Law, 21 Col., 29.
Com. vs. Perry, 155 Mass., 117.

Among the rights of contract thus protected is the right of men to form business relations among themselves.

Judge COOLEY says: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice" (Cooley on Torts, 278). The reverse must be equally true. A man may form business relations with whom he pleases, and in the conduct of such relations the persons thus associated may fix or limit the character and amount of their business or production, and the prices they will charge for the products which they manufacture, in which they deal or about which they contract.

In past ages the government exercised an almost unlimited power to control prices of commodities and labor, but, says Tiedeman, "Under a constitutional popular government there must necessarily be some limitation. It is a part of the natural and civil liberty to form business relations, free from the dictation of the State, that the like freedom should be secured and enjoyed in determining the condition and terms of the contract which constitutes the basis of the business relation or transaction. It is therefore the general rule that man is free to ask for his ware or his services whatever price he is able to get and others are willing to pay" (Tiedeman's Limitations of Police Power, 233).

What one man may do individually, two or more may do when lawfully associated in business relations.

It is not denied that the Legislature, in the exercise of police power, may infringe upon the liberty of the citizen and restrict even the right of contract; but as said by Tiedeman, Limitations of Police Power, Section 1, "any law which undertakes to abolish rights, the exercise of which does not involve an infringement on the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government."

Again, on page 197, he says:

> "It is also a judicial question whether the police regulation extends beyond the threatened evil and prohibits that which involves no threatening danger to the public. If it is unconstitutional to impose police regulations upon an innocent calling, it must be likewise unconstitutional to place an occupation under police restraint beyond what is necessary to dissipate the threatening evil. The Legislature has the choice of means to prevent evil to the public, but the means chosen must not go beyond the prevention of the evil, and prohibit what does not cause the evil."

All these views are well supported by authority. We need cite but few of the many cases which hold that the Legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact laws prohibiting harmless acts, not concerning health, safety or the welfare of society, and the courts may examine into and annul such illegal legislation.

T. W. & W. R. Co. vs. Jacksonville, 67 Ill., 37.
Coe vs. Shultz, 47 Barb., 64.
Quintini vs. City of Bay St. Louis, 1 South. R., 625.
Town of Lake View vs. Rose Hill Co., 70 Ill., 191.
Thorpe vs. R. R. Co., 27 Vt., 140.
Lowry vs. Rainwater, 70 Mo., 152.
Jeck vs. Anderson, 57 Cal., 251.

In People vs. Gillson, 109 N. Y., 389, 400, Mr. Justice PECKHAM said :

> "This brings us to the consideration of the question whether the act is valid as a proper exercise of what is, by way of classification, called the police power of the State. That power has never yet been fully described nor its extent plainly limited further, at least, than this ; it is not above the Constitution, but it is bounded by its provisions ; and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the Legislature or the executive of the police power. The extent of this power has been the subject of discussion in this court, and in the recent and most important case of *In re* Jacobs (98 N. Y., 107), the question was examined and most exhaustively reviewed by EARL, J., in his opinion. To reopen the subject now would be useless, and I refer to that case as authority for the statement that the Legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the Constitution of this State ; and that if the Legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts."

In Colon vs. Lisk, 153 N. Y., 188, the Court of Appeals of New York has recently restated the general rules laid down by the above authorities. The Court said, "equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power (People vs. Marx, 99 N. Y., 377, 387). Under the mere guise of a statute to protect against wrong, the legislature cannot arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods (People vs. Arensberg, 103 N. Y., 399). This power can be exercised only to promote the public good, and is always subject to judicial scrutiny (Forster vs. Scott, 136 N. Y., 577, 584). Whenever the legislature passes an act which transcends the limits of the police power it is the duty of the judiciary to pronounce it invalid and to nullify the legislative attempt to invade the citizens' rights (People *ex rel.* Nechamcus vs. Warden, 144 N. Y., 529, 535). That power must be exercised subject to the provisions of both the Federal and State Constitutions. Laws passed in the exercise of it must tend towards the preservation of the lives, health, morals or welfare of the community, and the court must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power (Health Department vs. Rector, 145 N. Y., 32, 39)."

Police Power and Public Policy.—The question whether the Legislature has passed the limit of its police power in enacting the law in question may be tested by the well-known legal principle of "public policy." Public policy is a branch of police power, applied by the courts, whereby individuals are pre-

vented from doing that which is injurious to the public or against the public good. Individuals are forced to yield portions of their natural rights when the exercise of these rights interferes with the good of the public. It is sometimes said that the Legislature creates public policy. By this is meant only that the Court cannot declare that to be contrary to public policy which the Legislature has legalized.

But the Legislature cannot create "public policy" in destruction of constitutional rights, nor in restriction of individual liberty, unless, in judicial opinion, such restriction is necessary for the public welfare. The validity of such laws always depends upon the question whether the enacted restrictions are demanded by public policy. No Court has ever held it to be contrary to public policy for persons to combine their capital, skill or acts with the purpose of, or (what is the same thing) with the effect of, preventing competition. No Court has ever held it to be contrary to public policy for persons to enter into agreements which preclude free and unrestricted competition among themselves. No Court has ever held it to be contrary to public policy for persons to unite capital, skill and acts, for the purpose of reducing the price of commodities. No Court has ever held contrary to public policy any union of interest which in any manner affects prices. No Court has ever held it to be contrary to public policy for persons united in business, whether as partners or corporators, to agree among themselves as to their production or prices, or to alter them as they may be able or the necessities of trade may demand. On the contrary, from the days of Magna Charta these things have been in accordance with public policy. The right to associate has been unquestioned; the right to unite capital, skill or acts has, from the earliest dawn of civilization, been free. Industry has not been carried on by unassociated individuals. Association has ever been a business necessity. Without it machinery could not have been

utilized, manufactories could not have been created, commodities could not have been transported. Railroads, telegraphs, steamships, mines, factories are rendered possible only by combination of capital, skill and acts, for the express purposes prohibited by the Texas act, and particularly for the purpose, and, as history proves, with the inevitable effect, of *reducing* the prices of commodities. The question of a return to individual industry involves a choice between civilization and barbarism—a choice between industry as now carried on in our commercial centres and as carried on in some of the rural and mountainous portions of our country, where as yet no combination of capital, skill or acts has taken place.

Agreements Which Prevent Competition Were Never Void at Common Law.

We desire to extend this argument in order to strengthen the position we have taken and to meet a possible objection to it. The assertion is often made that agreements which "prevent competition" are in restraint of trade, are contrary to public policy and void at common law. To this we reply that many agreements which prevent competition were never held to be in restraint of trade nor contrary to public policy nor void at common law, but the right to enter into such agreements has always been recognized as an undoubted liberty of citizens. The best evidence of this assertion is that the right to enter into copartnership has always been upheld, and corporations have always existed by virtue of law.

But this point upon which misapprehension exists to such an extent as to lead even careful Judges to a misuse of language seems to require further elaboration, although words seem powerless to make much clearer the simple proposition that copartnerships do prevent competition, and that all contracts in prevention of competition were never void at common law.

DIFFERENCE BETWEEN DICTA OF JUDGES AND STATUTE LAW.—It is admitted that cases can be cited in which Judges, delivering opinions, have said that whatever restricts competition, or has a tendency thereto, is void. But there is a vast difference between the effect of language in a judicial opinion and the same language in a statute. The language of the one must be interpreted in its application to the facts in a particular case, while the language of the other must be interpreted according to the literal meaning of the words. Hence the common law is fluid and adaptable to circumstances, while statute law is solid and not capable of adaptation. When a Court condemns restrictions of competition we study the facts of the case to learn the character of the restrictions condemned ; when a statute condemns restrictions of competition it does so without qualification, without exception, without regard to circumstances, and without consideration of the reasonableness or unreasonableness of the restrictions.

HISTORY OF LAWS AGAINST COMBINATION.—Going back to the beginning of our common law we will find that all laws against combination because restrictive of competition were statutory, and a brief reference to these statute laws and the reason and spirit of them will serve to show that the right to form associations is a part of that liberty which cannot be safely yielded into the hands of any legislative body.

At the foundation of all the statutes against trade combinations lies the idea that prices can be regulated by law. In a brief review in the second chapter of Thorold Rogers on " The Economical Interpretation of History " it is said that laws fixing prices on wheat and beer are so old that they are undated. An example of early statutes is 37 Edw. III., which fixes the prices of poultry, regulates the diet and apparel of servants, ordains that handicraftsmen shall use but one mystery, and is also the first statute against engrossing to enhance prices.

By very early statutes local authorities were empowered to fix prices on almost all products. Many statutes were enacted regulating prices of meat and clothing. Early attention was paid to the rate of wages, because prices were supposed to be dependent upon wages. The first of the infamous Statutes of Laborers was 23 Edw. III., A. D. 1349. This punished employees for taking wages higher than those fixed by law, and employers for paying them. It also attempted to compel the sale of all manner of victual at reasonable prices. It was but natural that workmen should combine against such laws, and consequently in a new Statute of Laborers, 34 Edw. III., A. D. 1360, we find the first statute against association, in the provision that alliances, covines, congregations, chapters, ordinances and oaths made, or to be made, by masons or carpenters should be void and annulled. This provision is contained in a statute which prescribed that fugitive laborers should be branded with the letter F. The Statute of Laborers was amended and re-enacted in various reigns with divers provisions against confederacies of workingmen. 3 Hen. VI., C. 1, was an act against confederacies and yearly congregations of masons in general chapters, and 15 Hen. VI., C. 6, prohibited guilds of laborers and artificers. From 23 Edw. I. to James I., thirty-seven acts against laborers were passed. All were repealed and a new one framed, 5 Eliz., C. 4. This system of infamous laws which enslaved the laborer was not finally swept from the statute book until 1825.

During the same periods numerous other statutes were passed fixing prices upon products, endeavoring to prevent enchancement of prices, and in some cases to prevent lowering of prices. They are too numerous for enumeration. They will be found in "Pickering's Statutes," and many of them are referred to and quoted in an able and interesting work just published by Albert Stickney, of the New York bar, entitled

"State Control of Trade and Commerce." The best known of the statutes of this character is 5 and 6 Edw. VI., C. 14, relative to forestalling, regrating and engrossing, which act created a variety of offenses, even punishing such persons as were guilty of "making any motion by word, letter, message or otherwise for the enchancing of the price or dearer selling of anything or things above mentioned," and also those who got "into his or their hands by buying, contracting, or promise-taking to the intent to sell again." In relation to all of these acts, it may be said they prevented dealings by wholesale, and are utterly incompatible with modern business. They were all, some thirty-six in number, swept away by the statute 7 and 8 Vict., C. 24, with the confession that they created the evils they sought to alleviate.

The offenses of the character above enumerated, created by statutes, became known as "offenses against trade." The persons who, through a union of capital, skill or acts, produced any of the prohibited results became guilty of a conspiracy against trade. In the Law of Criminal Conspiracies and Agreements, by R. S. Wright, p. 12, n. 6, it is stated that the crime of conspiracy is statutory, and not of common law, and that the different statutory laws relative to conspiracy were enacted in aid of statutes such as enumerated, as, for instances, the various Statutes of Laborers, the Statute of 27 Edw. III., A. D. 1353, making it a felony for merchants to make "conspiracy, confederacy, covine, imagination, evil device or murmur," for the disturbance of the staples and of the price of wool, and many similar. Whether this be correct, or whether the crime of conspiracy ante-dated the statutes, it is evident that conspiracy against trade once embraced scores of statutory offenses not now deemed illegal.

The Right to Form Partnerships Always Existed. And here is a point which cannot be too strongly im-

pressed upon the judicial mind, that amid all this madness of legislation, and during the centuries when a mistaken belief prevailed that any alliances, covines or associations of persons engaged in business had the tendency to injuriously affect prices and interfere with trade, the right to form partnerships in business existed and was recognized as a common law right. This is evident from the fact that no case has been found in which the right has been questioned. It is evident also from the few statutes by which the right was limited. Of these we have discovered only two, but it is probable there were others. The statute, 28 Geo. III., C. 53, declared it an unlawful combination for five or more persons to unite in covenant or partnership to purchase coals for sale. The statute, 17 Geo. III., C. 42, prevented combinations by copartnership, or otherwise, in the purchase or sale of bricks.

Copartnerships were therefore recognized as combinations which prevented competition and effected prices. How could it be otherwise? And yet in spite of a frenzy in relation to combinations to affect prices which Adam Smith compared to the witchcraft craze, the partnership remained unmolested. For this no other reason can be given than that the right to form partnerships was a portion of that liberty which was secured by Magna Charta, of which no freeman might be deprived. "*Nullus liber homo, &c.*" These words, says PARKER, C. J., in *Mitchel vs. Reynolds*, 1 Smith's L. C., 511, "have been always taken to extend to freedom of trade." Therefore Parliament, in its omnipotence, respected the right, and even Judges affected by the prevailing craze permitted it to exist unchallenged.

The laws relative to partnership existed as Lord COKE said, "*per legem mercatoriam*, which, as hath been said, is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*." And so the right of association in business continued as one of the sacred

liberties of free citizens almost untouched through all those centuries in which, as Buckle says, "every European government, which legislated respecting trade, acted as if its main object was to suppress the trade and ruin the traders. Laws to regulate wages, laws to regulate prices, laws to regulate profits; interference with markets, interference with manufactories, interference with machinery, interference even with shops."

Corporations. The long continued battle against corporations, while partnerships went unscathed, shows that it was not combinations *per se*, but peculiar methods of combination which excited legal animadversions. Corporations could only be created by king's patent, or act of Parliament, consequently there was no need of anti-corporation laws.

Most corporations were, in fact, monopolies by virtue of their charter, but corporations, as such, were denounced as tending to obstruct the free use of labor, as limiting competition, as putting down individual industry, and affording facilities for combinations among tradesmen for defrauding the public. The subject is discussed by Adam Smith and other political economists. But corporations vindicated their right to exist, notwithstanding these fears.

Joint Stock Associations. One form of partnership was condemned by law in a manner which suggests the statute under consideration; namely, a partnership with transferable shares, or a joint stock association. The statute, 6 Geo. I., C. 18, declared associations for commercial undertakings with transferable shares to be a common nuisance, and inflicted the penalty of imprisonment for life and confiscation of goods. Even this severity of punishment has been imitated in the Texas act. This statute, which is known in history as the "Infamous Bubble Act," was during its existence a dead letter and was long ago repealed.

Joint stock associations existed in spite of it, otherwise England's rapidly developing industries could never have been carried on. Few persons were convicted under it and none were punished. The law was simply futile, says Lindley in his work on Partnership, page 6. In fact, it is doubtful if these old statutes relative to combinations to enhance prices were ever enforced. An investigation confirms what is said by Stickney in the work above cited: "The reports of cases in the English Courts show an almost entire absence of even so much as an attempt to enforce these old statutes. In time, by common consent, the statutes making such combinations criminal became obsolete. It was found by experience that they could not be enforced, and that their mere existence, with occasional sporadic attempts at enforcement, did more harm than good." The cases arising under the Bubble Act seem to be the first in which it was urged that whatever interfered with competition is contrary to law.

CASES UNDER THE BUBBLE ACT: In *R. vs. Webb*, 14 East, 406, and *Pratt vs. Hutchinson*. 15 East, 511, it was strongly urged that the grouping together of numbers of persons, with transferable shares, for the purpose of carrying on trade, was calculated to put down individual industry and competition. It was said "if fifty persons may do this, why may not a thousand?" This argument of danger in numbers applies to an ordinary partnership as strongly as to a joint stock association. It did not prevail with the Court in those cases. It is true that Lord ELDON was of the opinion that companies with large capitals and with transferable shares were injurious to the public and illegal, independent of the act referred to (1 Lindley on Part., 193), but this opinion did not prevail, and such associations after some fluctuations of opinion were finally held to be legal unless affirmatively shown to be of a dangerous or mischievous character (1 Lindley on Part., 194).

Thus it is evident that while the statutory law and the dicta of Judges in some cases went to absurd lengths against certain forms of association, the right of association, notwithstanding the recognized and established fact that it limits competition, was never denied, and has existed under the protection of law from the days of the adoption of the law merchant until the present time. Never, either by common law nor by statute law, were all agreements in restriction of competition illegal. Such agreements were among the most ordinary and necessary in commercial life, and the right to enter into them was one of the most cherished liberties of the citizen.

The Court, by BOWEN, J., in Mogul S. S. Co. vs. McGregor, 23 Q. B. D., 598, stated a principle which was always a principle of the common law, as follows:

> "The truth is that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse for the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would in the present day be impossible—would be only another method of attempting to set boundaries to the tides."

This case is authority, if authority could be needed, for the proposition that combinations which restricted competition, and which prevented competition between the persons combined, never were illegal by the com-

mon law of England. This conclusion cannot be doubted when it is remembered that the statute laws of England never went to the length of preventing all association.

REVIEW OF AMERICAN CASES: We now desire to review briefly the American cases in regard to restrictions of competition.

It will not be questioned that the right of persons to associate themselves and their capital and skill has existed in this country from the earliest colonial times, and has been exercised to a greater extent than in any other country. All the important business of the land is conducted through firms, associations and corporations. If there are cases which decide combinations in restriction of competition to be illegal, they are in direct variance with the industrial history of the country and with the statutes of all our States which authorize the creation of partnerships and corporations. But an examination of the cases will show that it is not association *per se*, but only certain associations which have been condemned. The language of Judges may have been broader than this, but such language must be qualified in its application to the particular facts of the cases.

The first American case in which an opinion was enunciated, which, carried to its full extent, would be fatal to association, was *Hooker vs. Vandewater*, 4 Denio, 349.

The Court (JEWETT, J.) says: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal, to it."

This is the first case in which we find this language used. The familiar maxim is ancient enough, but the conclusion that "whatever relaxes competition in trade is injurious, if not fatal, to it," seems to have been an original deduction of the Judge in the case, and can hardly be accepted as conclusive either in law or economics.

The citation of authority for this language is *People vs. Fisher*, 14 Wend., 9. *People vs. Fisher* was an indictment for a conspiracy of shoemakers to raise wages by striking, and was sustainable, if at all, on the ground that the workmen used illegal means to accomplish a legal purpose. It did not use, and was never authority for, the language quoted. *Hooker vs. Vandewater* was the case of a pooling agreement between several individuals and firms, the proprietors of five several lines of boats on the Erie and Oswego canals. They did not unite their capital, skill or acts. They were competitors and pooled their profits solely for the purpose of controlling or raising prices, which were to be established by agreement of all the parties interested. The language of the Court must be interpreted in its application to the case, and, being so interpreted, means only that pooling agreements between competitors for the purpose of controlling prices are contrary to public policy. This is very distinct from a combination of persons, capital, skill or acts in one firm or corporation, by means of which parties cease to be competitors and work for a joint interest.

The case of *Stanton vs. Allen*, 5 Denio, 434, was likewise a pooling agreement among the proprietors of boats on the Erie and Oswego Canals, by which they regulated the price of freight and passage by a uniform scale, and divided the profits according to the number of boats employed by each.

There was no common ownership of the capital employed; there was no union of persons, skill or acts. Firms which were separate remained separate, and each continued to carry on its own business separately. If the statute only condemned such agreements not a word would be said against its constitutionality.

An early and important case, which clearly notes a diversity between combinations which destroy competition, is *Com. vs. Carlisle*, Brightly (Pa.), 36. That noted jurist, Judge GIBSON, says:

"If a number of persons should combine to establish a ferry, not from motives of public or private utility, but to ruin or injure the owner of a neighboring ferry, the wickedness of the motive would render the association criminal, although it is otherwise where capital is combined, not for the purpose of oppression, but fair competition with others of the same calling. An association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large, and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual. The combination of capital for the purposes of commerce, or to carry on any other branch of industry, although it may in its consequences indirectly operate on third persons, is unaffected by this consideration, because it is a common means in the ordinary course of human affairs which stimulates to competition and enables men to engage in undertakings too weighty for an individual" (p. 40).

In the case of *Central Ohio Salt Co. vs. Guthrie*, 35 Ohio St., 666, thirty or more persons, firms or corporations who were and continued to be engaged separately in the manufacture of salt entered into a pooling agreement for the sole purpose of reglating prices, and for that end placed the business of receiving and distributing the salt manufactured by the different concerns under the control of five persons, to be chosen annually.

The language used by the Court in regard to the restriction of competition must be interpreted with reference to the nature of the agreement, which was a pooling agreement between competitors, and not a union of capital, skill or acts in a partnership.

The same is true of

Emery vs. The Ohio Candle Co., 47 Ohio St., 320.

Morris Run Coal Co. vs. Barclay Coal Co., 68 Pa. St., 173.

India Bagging Association vs. Koch & Co., 14 La. Ann., 168.

U. S. vs. Jellico Coal Co., 46 Fed. Rep., 432.
Lumber Co. vs. Hayes, 76 Cal., 387.
Craft vs. McConoughy, 79 Ill., 346.
Gibbs vs. Gas Co., 130 U. S., 396.

and many others. All were cases of contracts between competing companies which did not unite their capital, skill or acts, but only agreed as to prices and production and pooling of their receipts. As was said by SANBORN, J., in U. S. vs. Trans-Missouri Freight Association, 58 Fed. Rep., 58:

> "In none of those cases were they [the courts] required to hold, and in none of them did they hold, as we understand the opinions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal."

It is easy to refer to a current of cases to show that a multitude of contracts and combinations which restrict competition are legal, not taking into consideration the ordinary commercial partnership, which has never been questioned in any court, nor joint stock associations nor corporations, which are authorized by statute in every State. It is not necessary to cite the cases which hold contracts in reasonable restriction of trade to be legal, although all such contracts are in restriction of competition. The leading case of *Mitchel vs. Reynolds*, 1 P. Wms., 181, held that a contract which clearly restricted competition was not illegal. A multitude of other cases will be found collected in the U. S. vs. Trans-Missouri Freight Association, 58 Fed. Rep., 71 and 72.

In *Marsh vs. Russell*, 66 N. Y., 288, a distinction between legal contracts in restraint of competition and illegal contracts in restriction of trade was clearly set forth as follows:

> "When a lawful business is carried on by a firm its members can regulate the prices at which they will buy and sell.

> * * * Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their article of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a certain price? Such an agreement would certainly not upon its face be unlawful."

Parties associated for a reasonable and honest purpose may agree not to compete (*Phippen vs. Stickney*, 3 Met., 384).

Two firms were competitors in the business of transportation. As such they could not enter into an agreement not to compete or to fix prices. But they agreed to organize a corporation to conduct the business theretofore conducted by the competing firms. Held to be legal (*Lorillard vs. Clyde*, 86 N. Y., 384).

The *Central Shade Roller Co. vs. Cushman*, 143 Mass., 353, holds that competitors may agree to form a corporation for the purpose of preventing competition.

In *Craft vs. McConoughy*, 79 Ill., 346, the Court points out that "a partnership had not been formed for the purpose of trading in grain, but only a secret combination to enable the parties, by secret and fraudulent means, to control the prices of grain."

In *Diamond Match Co. vs. Roeber*, 106 N. Y., 473, the Court says:

> "We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the purpose of preventing competition, and the validity of the contract, if supported by a consideration, will turn upon its reasonableness as between the parties.
>
> "Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil."

Leslie vs. Lorillard, 110 N. Y., 519–534.

In *Matthews vs. Associated Press*, 136 N. Y., 333, the defendant was a corporation organized for the purpose of collecting news for publication in the newspapers which composed its membership. It adopted a by-law prohibiting its members from receiving, or publishing, the regular news dispatches of any other news association covering a like territory and organized for a like purpose. The Court held that the by-law was reasonable and valid. It said:

> "The greater the number belonging to the organization, the larger will be its income, and the greater amount it will be able to spend for making the collection of news, and the more efficient and valuable such collection will be. *To suppress competition in such chosen field among themselves* and to thus enhance the value of the property and the conveniences arising from the extended use of the means and opportunities of the association, it would seem most appropriate to provide that the members of such association should not take news from any other" (p. 341).
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> "Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the court to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality."
>
> *Jones vs. Fell*, 5 Fla., 510, 515.
>
> "As a matter of fact, nearly all enterprises in this State, requiring for their execution an expenditure of large capital, are undertaken by corporations. They engage in commerce; they build and sail ships; they cover our navigable streams with steamers; they construct houses; they bring the products of earth and sea to market; they light our streets and buildings; they open and work mines; they carry water into our cities; they build railroads and cross mountains and deserts with them; they erect churches, colleges, lyceums and theatres; they set up manufactories, and keep the spindle and shuttle in motion; they establish banks for sav-

> ings; they insure against accidents on land and sea; they give policies on life; they make money exchanges with all parts of the world; they publish newspapers and books, and send news by lightning across the continent and under the ocean. Indeed, there is nothing that is lawful to be done to feed and clothe our people, to beautify and adorn their dwellings, to relieve the sick, to help the needy, and to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations."
>
> Judge FIELD in Railroad Tax Cases, 13 Fed. Rep., 743.

In the late case of United States vs. Addyston Pipe & Steel Co., 85 Fed. Rep., 271, TAFFT, C. J., reviews a multitude of cases, and endeavors to extract from them established principles on the subject of restraint of trade. The opinion would have been clearer had the proper distinction been drawn between restraint of trade and restraint of competition. It is only under exceptional circumstances, as the opinion clearly shows, that restraint of competition is restraint of trade. As the learned Judge well says, page 280: "when two men become partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise and energy to carry on a successful business and one useful to the community." Again (p. 281) he enumerates several agreements in restraint of competition which are not in restraint of trade, showing further (p. 290) that agreements in restraint of competition are in restraint of trade only where there was no relation of partnership, or of vendor or vendee, or employer or employee between the parties. To this he might have added other relations recognized by law such as corporators, co-owners, joint tenants and tenants in common.

The foregoing citation of authorities is solely for the purpose of showing that which does not seem to be in need of proof, to wit, that associations restrictive of

competition were not void at common law, but that on the contrary combinations restrictive of competition have always been upheld by law, and the right to combine is to be classed among the most important and least questioned liberties of citizens.

When it was held by this Court in United States vs. Trans-Missouri Freight Association, 166 U. S., 290, that an Act of Congress made criminal restraints of interstate commerce whether reasonable or unreasonable, great apprehension was created in the minds of men engaged in trade lest contracts necessary in business and harmful to no one might be found to be criminal. This, possibly, led this Court to say in United States vs. Joint Traffic Association, 171 U. S., 505, "to suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote or indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court."

But consider what greater apprehension must be felt if now it be held that legislatures may declare criminal contracts and associations restrictive of *competition*, whether they be reasonable or unreasonable; that two men may not enter into any combination or agreement which precludes free and unrestricted competition between themselves or themselves and others; that men may not make any agreement as to prices, nor unite any interest which may affect prices. If the liberty which our Constitution guarantees does not protect the men who conduct the business of this country against such absurd and dangerous legislation, it is but a glittering generality, instead of a safeguard upon which the citizen may rely.

S. C. T. Dodd,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States,

October Term, 1898.

No. 334.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICTS OF THE STATE OF TEXAS.

(No. 16,919.)

STATEMENT OF CASE.

The statement of case made by plaintiffs in error is not full enough, hence the following is made:

This suit was brought in the district court of Travis county, Texas, on the 5th day of February, 1896. The case was a complaint by the State, acting through its Attorney-General, of the Waters-Pierce Oil Company, E. T. Hathaway, Wm. F. Grice, F. A. Austin, J. W. Keenan, and Lewis Fries, hereinafter styled defendants, alleging in substance:

"1. That the State of Texas, acting by and through its Attorney-General, is the plaintiff.

"2. That the Waters-Pierce Oil Company, E. T. Hathaway, William Grice, F. A. Austin, J. W. Keenan and Lewis Fries are defendants.

"3. That the Waters-Pierce Oil Company is a private corporation duly and legally incorporated under the laws of the State of Missouri, and that its principal offices are situated in the city of St.

Louis, in the State of Missouri, with the following officers: Henry Clay Pierce, president; Arthur M. Finlay, vice-president; N. M. Adams, treasurer; J. P. Gruet, secretary, and E. Willis, Auditor; that, as shown by its articles of incorporation, the objects for which said company was formed are dealing in naval stores and dealing in and compounding petroleum and other oils and all the products thereof, and buying and selling the same in the State of Missouri and other States; that the capital stock of said corporation was originally the sum of one hundred thousand dollars, but that the amount of same was, in accordance with the laws of said State of Missouri, on, to-wit, the 20th day of June, 1882, increased to the sum of four hundred thousand dollars.

"4. That on, to-wit, July 6th, 1889, said Waters-Pierce Oil Company filed in the Secretary of State's office of this State, in accordance with the requirements of law, a certified copy of its articles of incorporation, and secured a permit to transact business, as stated in its said articles of incorporation, in this State for the term of ten years from said date.

"5. That since said date said corporation has been, under and by virtue of said permit, transacting business in this State; that for the purpose of transacting said business, it has, in pursuance of its policy and purposes, hereinafter to be stated, and in pursuance of the policy, objects and purposes of the unlawful combinations and trusts hereinafter to be named and described, subdivided the State of Texas into five grand divisions, in which to sell the oils of the Waters-Pierce Oil Company and carry out its purposes and the purposes and objects of the unlawful combinations and trusts hereinafter mentioned, and has appointed an agent for each grand division, and has also appointed many local agents for the various towns, cities and counties in this State; that the defendant E. T. Hathaway, a resident of the city of Denison, Grayson county, Texas, is and has been for many years the general manager of said Waters-Pierce Oil Company for the North Texas division; that the defendant F. A. Austin, a resident of the city of Marshall, Harrison county, Texas, is the manager of Waters-Pierce Oil Company for the East Texas division; that the defendant Wm. Grice, a resident of the city of Dallas, Dallas county, Texas, is the manager of the Waters-Pierce Oil Company for the Central Texas division; that the defendant J. W. Keenan, a resident of Galveston, Galveston

county, Texas, is the acting manager of said company for the Southern Texas division; that the defendant Lewis Fries, a resident of the city of San Antonio, Bexar county, Texas, is the manager of said company for the Western Texas division; that one W. B. Abadie, a resident of Travis county, Texas, is the local agent for said company at the city of Austin, Travis county, Texas.

"6. That heretofore, to-wit, on or about the 2nd day of January, 1882, and again on or about the 4th day of said month, a great many firms, partnerships, individuals and corporations, the said firms, partnerships, individuals and corporations being stated in the instruments of writing hereinafter set out, and owning and controlling a large amount of the money and capital invested in the production of petroleum and its products and in the production, manufacture and sale and shipment of said products, and the means and instrumentalities employed in such industries, met at some place in the United States, to your petitioner unknown, and made, entered into and executed the following unlawful agreements, combinations and trusts, to-wit:

"'This agreement made and entered into upon this second day of January, 1882, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth:

"'I. It is intended that the parties to this agreement shall embrace three classes, to-wit:

"'1st. All the stockholders and members of the following corporations and limited partnerships, to-wit:

"'Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Co.; Elizabethport Acid Works; Imperial Refining Co., Limited; Chas. Pratt & Co.; Payne, Ablett & Co., Limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburg); Smith's Ferry Oil Trans. Company; Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited.

"'Also, all stockholders and members of other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

"'2nd. The following individuals, to-wit:

"'W. C. Andrews, Jno. D. Archbold, Lide K. Arter, J. A. Bostick, Benj. Brewster, D. Bushnell, Thos. C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, H. M. Harma, and Geo. W. Chapin, D. M. Harkness, trustee, S. V. Harkness, John Huntington, H. A. Hutchins, Chas. F. G. Heye, O. B. Jennings, Chas. Lockhart, A. M. McGregor, Wm. H. Macy, William H. Macy, Jr., estate of Josiah Macy, Jr., Wm. H. Macy, Jr., executor, O. H. Payne, O. H. Payne, trustee, Chas. Pratt, Horace A. Pratt, C. M. Pratt, A. J. Pouch, John D. Rockefeller, Wm. Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandegrift, William T. Wardwell, W. G. Warden, Jos. L. Warden, Frew & Co., Louis C. Wheaton, Julia H. York, Geo. H. Vilas, M. R. Keath, Geo. F. Chester, trustee.

"'Also, all such individuals as may hereafter join in this agreement at the request of the trustees herein provided for.

"'3rd. A portion of the stockholders and members of the following corporations and limited partnerships, to-wit:

" 'American Lubricating Oil Company, Baltimore United Oil Company, Beacon Oil Co., Bush & Denslow Manufacturing Co., Central Refining Co., of Pittsburg, Cheesbrough Manufacturing Company, Chess-Carley Co., Consolidated Tank Line Co., Inland Oil Co., Keystone Refining Co., Maverick Oil Co., National Transit Co., Portland Kerosene Oil Co., Producer's Consolidated Land and Petroleum Co., Signal Oil Works, Limited, Thompson & Bedford Co., Limited, Devoe Manufacturing Co., Eclipse Lubricating Oil Co., Limited, Empire Refining Co., Limited, Franklin Pipe Co., Limited, Galena Oil Works, Limited, Galena Farm Oil Co., Limited, Germania Mining Co., Vacuum Oil Co., H. C. Tan Vine & Co., Limited, Waters-Pierce Oil Company.

" 'Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

" 'II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows:

" '(1) As soon as practicable, a corporation shall be formed in each of the following States, under the laws thereof, to-wit: Ohio, New York, Pennsylvania and New Jersey; provided, however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

" '(2) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine and deal in petroleum and all its products, and all the materials used in such business, and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter, or, if necessary to comply with the law, the powers aforesaid may be restricted and reduced.

" '(3) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other States and Territories.

" '(4) Each of said corporations shall be known as the Standard Oil Company of ———— (and here shall follow the name of the State or Territory by virtue of the laws of which said corporation is organized).

" '(5) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same in view of the purpose to be accomplished.

" '(6) The shares of stock of said corporations shall be issued only for money, property or assets equal at a fair valuation to the par value of the stock delivered therefor.

" '(7) All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be transferred to and vested in the several Standard Oil Companies. All of the property, assets and business in, or of each particular State shall be transferred to and vested in the Standard Oil Company of that particular State, and in order to accomplish such purpose, the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first, are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement), to sell, assign, transfer, convey and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or Companies of the proper State or States, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets and business of said corporations and limited partnerships. Correct schedules of said property, assets and business shall accompany each transfer.

" '(8) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey and set over all of the property, real and personal, assets and

business mentioned and embraced in schedules accompanying such sale and transfer to the Standard Oil Company or Companies, of the proper State or States, as soon as the said corporations are organized and ready to receive the same.

"'(9) The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named, to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignments of stocks in the same or similar companies upon the terms herein provided, and that whenever or as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper State, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the values of the money, property and business assigned to be held in place of the stocks of the company or companies assigning such property.

"'(10) The consideration for the transfer and conveyance of the money, property and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors, and no stock of any of said companies shall ever be issued, except for money, property or business, equal at least to the par value of the stock so issued, nor shall any stock be issued by any of said companies for any purpose, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

"'(11) The consideration for any stocks delivered to said trustees, as above provided for as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto, of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Company so received by said trustees and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

"'III. The trusts upon which said stock shall be held, and the number, powers, and duties of said trustees shall be as follows:

"'(1) The number of trusts shall be nine.

"'(2) J. D. Rockefeller, O. H. Payne and Wm. Rockefeller are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1885.

"'(3) J. A. Bostick, H. M. Flagler and W. G. Warden are hereby appointed trustees to hold their office until the first Wednesday of April, A. D. 1884.

"'(4) Chas. Pratt, Benj. Brewster and Jno. D. Archbold are hereby ap-

pointed trustees, to hold their office until the first Wednesday of April, A. D. 1883.

" '(5) Elections for trustees to succeed those herein appointed shall be held annually, at which election a sufficient number of trustees shall be elected to fill all vacancies occurring either from the expiration of the term of the office of trustees, or from any other cause. All trustees shall be elected to hold their office for three years, except those elected to fill a vacancy arising from any cause, except expiration of term, who shall be elected for the balance of the term of the trustee whose place they are elected to fill. Every trustee shall hold his office until his successor is elected.

" '(6) Trustees shall be elected by ballot by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates, who may be registered as such on the books of the trustee, may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names, but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books may be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such election shall elect.

" '(7) The annual meeting of the owners of such trust certificates for the election of trustees, and for other business, shall be held at the office of the trustees, in the City of New York on the first Wednesday of April of each year, unless the place of meeting be changed by the trustees, and said meeting may be adjourned from day to day until its business is completed. Special meetings of the owners of said trust certificates may be called by the majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of holders of trust certificates whenever requested to do so by a petition signed by the holders of ten per cent. in value of such certificates. The business of such special meetings shall be confined to the object specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given, by personal notice as far as possible, and by public notice in one of the principal newspapers of each State, in which a Standard Oil Company exists, at least ten days before such meeting. At any meeting a majority in value of the holders of trust certificates represented consenting thereto, by-laws may be made, amended and repealed, relative to the mode of election of trustees and other business of the holders of trust certificates, provided, however, that said by-laws shall be in conformity with this agreement. By-laws may also be made, amended and repealed at any meeting by and with the consent of a majority in value of the holders of trust certificates, which alter this agreement relative to the number, powers and duties of the trustees, and to other matters tending to the more efficient accomplishment of the objects for which the trust is created, provided only that the essential intents and purposes of this agreement be not thereby changed.

" '(8) Whenever a vacancy occurs in the board of trustees more than sixty days prior to the annual meeting for the election of trustees it shall be the duty of the remaining trustees to call a meeting of the owners of the Standard Oil trust certificates for the purpose of electing a trustee or trustees to fill the vacancy or vacancies. If any vacancy occurs in the board of trustees from any cause, within sixty days of the date of the annual meeting for the election of trustees, the vacancy may be filled by a majority of the remaining trustees, or at their option, may remain vacant until the annual election.

" '(9) If, for any reason, at any time a trustee or trustees shall be appointed by any court to fill any vacancy or vacancies in said board of trustees, the trustee or trustees so appointed shall hold his or their respective office or offices only until a successor or successors shall be elected in the manner above provided for.

" '(10) Whenever any change shall occur in the board of trustees, the legal

title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee or the administrator or executor of any deceased trustee to make said transfer.

" '(11) The trustees shall prepare certificates which shall allow the interest of each beneficiary in said trust, and deliver them to the persons properly entitled thereto. They shall be divided into shares of the par value of one hundred dollars each, and shall be known as Standard Oil trust certificates, hundred dollars each and shall be known as Standard Oil trust certificates, and shall be issued subject to all the terms and conditions of this agreement. The trustees shall have power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be signed, attested and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement and by the by-laws herein provided for.

" '(12) No certificates shall be issued except for stocks and bonds held in trust, as herein provided for and the par value of certificates issued by said trustees shall be equal to the par value of the stocks of said Standard Oil Companies, and the appraised value of other bonds and stocks held in trust. The various bonds, stocks and moneys held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the evidence of the interest held by the several parties in this trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificate or certificates for cancellation, or upon satisfactory proof of the loss thereof, and in the latter case they shall require a sufficient bond of indemnity.

" '(13) The stocks of the various Standard Oil Companies held in trust by said trustees, shall not be sold, assigned or transferred by said trustees, or by the beneficiaries, or by both combined, so long as this trust endures. The stocks and bonds of other corporations, held by said trustees, may be by them exchanged or sold and the proceeds thereof distributed pro rata to the holders of trust certificates, or said proceeds may be held and reinvested by said trustees for the purposes and uses of the trust; provided, however, that said trustees may, from time to time, assign such shares of stock of said Standard Oil Companies as may be necessary to qualify any person or persons chosen or to be chosen as directors and officers of any of said Standard Oil Companies.

" '(14) It shall be the duty of said trustees to receive and safely keep all interest and dividends declared and paid upon any of the said bonds, stocks and moneys held by them in trust and to distribute all moneys received from such sources or from sales of trust property or otherwise by declaring and paying dividends upon the Standard trust certificates as funds accumulate, which, in their judgment, are not needed for the uses and expenses of said trust. The trustees shall, however, keep separate accounts of receipts from interest and dividends, and of receipts from sales or transfers of trust property, and in making any distribution of trust funds, in which moneys derived from sales or transfers shall be included, shall render the holders of trust certificates a statement showing what amount of the fund distributed has been derived from such sales or transfers. The said trustee may also be authorized and empowered by a vote of the majority in value of holders of trust certificates, whenever stocks or bonds have accumulated in their hands from money purchases thereof, or the stock or bonds held by them have increased in value, or stock dividends shall have been declared by any of the companies whose stocks are held by said trustees or whenever from any such cause it is deemed advisable to so do, to increase the amount of trust certificates to the extent of such increase or accumulation of values, and to divide the same among the persons then owning trust certificates pro rata.

" '(15) It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships, any portion of whose stock is held in trust. It shall be their duty as stockholders of said companies to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interest of the holders of said trust certificates.

" '(16) All the powers of the trustees may be exercised by a majority of their number. They may appoint from their own number an executive and other committees. A majority of each committee shall exercise all the powers which the trustees may confer upon such committee.

" '(17) The trustees may employ and pay all such agents and attorneys as they deem necessary in the management of said trust.

" '(18) Each trustee shall be entitled to a salary for his services not exceeding twenty-five thousand dollars per annum, except the president of the board, who may be voted a salary not exceeding thirty thousand dollars per annum, which salaries shall be fixed by said board of trustees. All salaries and expenses connected with or growing out of the trust shall be paid by the trustees from the trust fund.

" '(19) The board of trustees shall have its principal office in the City of New York, unless changed by vote of the trustees, at which office, or at some place of safe deposit in said city, the bonds and stocks shall be kept. The trustees shall have power to adopt rules and regulations pertaining to the meetings of the board, the election of officers and the management of the trust.

" '(20) The trustees shall render at each annual meeting a statement of the affairs of the trust. If a termination of the trust be agreed upon as hereinafter provided, or within a reasonable time prior to its termination by lapse of time, the trustees shall furnish to the holders of the trust certificates a true and perfect inventory and appraisement of all stocks and other property held in trust, and a statement of the financial affairs of the various companies whose stocks are held in trust.

" '(21) This trust shall continue during the lives of the survivors and survivor of the trustees in this agreement named, and for twenty-one years thereafter; provided, however, that if at any time after the expiration of ten years two-thirds of all the holders in value, or if after the expiration of one year, ninety per cent. of all the holders in value of trust certificates shall, at a meeting of holders of trust certificates called for that purpose, vote to terminate this trust at some time to be by them then and there fixed, the said trust shall terminate at the date so fixed. If the holders of trust certificates shall vote to terminate the trust as aforesaid, they may, at the same meeting or at a subsequent meeting called for that purpose decide by a vote of two-thirds in value of their number the mode in which the affairs of the trust shall be wound up, and whether the trust property shall be distributed or whether it shall be sold and the values thereof distributed, or whether part, and if so, what part shall be divided and what part shall be sold, and whether such sales shall be public or private. The trustees, who shall continue to hold their office for that purpose, shall make the distribution in the mode directed, or, if no mode be agreed upon by two-thirds in value, as aforesaid, the trustees shall make distributions of the trust property according to law. But said distribution, however made, and whether it be of property, or values, or of both, shall be just and equitable, and such as to insure to each owner of a trust certificate his due proportion of the trust property or the value thereof.

" '(22) If the trust shall be determinated by expiration of the time for which it is created, the distribution of the trust property shall be directed and made in the mode above provided.

"'(23) This agreement, together with the registry of certificates, books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees.'

"The second agreement being as follows:

"'Whereas, in and by an agreement dated January 2nd, 1882, and known as the Standard trust agreement, the parties thereto did mutually covenant and agree inter alia, as follows, to-wit: That corporations to be known as Standard Oil Companies, of various States, should be formed, and that all of the property, real and personal, assets and business of each and all of the corporations and limited partnerships mentioned or embraced in class first of said agreement should be transferred to and vested in the said several Standard Oil Companies; that all of the property, assets and business in or of each particular State should be transferred to and vested in the Standard Oil Company of that particular State, and the directors and managers of each and all of the several corporations and associations mentioned in class first were authorized and directed to sell, assign, transfer, convey and make over to the Standard Oil Company or Companies of the proper State or States, as soon as said corporations were organized and ready to receive the same, all the property, real and personal, assets and business of said corporations or associations; and, whereas, it is not deemed expedient that all of the companies and associations mentioned should transfer their property to the said Standard Oil Companies at the present time, and in case of some companies and associations it may never be deemed expedient that the said transfer should be made, and said companies and associations go out of existence; and whereas, it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer or transfers should take place, if at all.

"'Now, it is hereby mutually agreed between the parties to the said trust agreement and as supplementary thereto, that the trustees named in said agreement, and their successors, shall have the power and authority to decide what companies shall convey their said property as in said agreement contemplated, and when the said sales and transfers shall take place, if at all, and until said trustees shall so decide each of said companies shall remain in existence and retain its property and business, and the trustees shall hold the stocks thereof in trust, as in said agreement provided. In the exercise of said discretion the trustees shall act by a majority of their number, as provided in said trust agreement. All portions of said trust agreement relating to this subject shall be considered so changed as to be in harmony with this supplemental agreement.

"'In witness whereof, the said parties have subscribed this agreement, this 4th day of January, 1882.'

"7. Plaintiff further avers that the real object, purpose and intent of the firms, partnerships, individuals and corporations, in making and entering into said agreement and trust was and is to control and monopolize the petroleum industry in the United States and the several States thereof, and to monopolize and control the business of manufacturing, refining, selling and transporting petroleum and its products, refined oils, illuminating oils, and lubricating oils in the several States of the United States; that by said agreement said firms, individuals, partnerships, corporations, and companies therein mentioned intended to and did create, make and effect a combination of their capital, skill and acts for the purpose

of monopolizing and controlling the petroleum industry in the several States of the United States and the business of selling and dealing in petroleum and its products, refined, lubricating and illuminating oils, in the domestic trade of the various States of said United States; that by said agreement the said parties thereto intended and did make and effect a combination of their capital, skill and acts for the following purposes, in addition to the purposes named, to-wit:

"1st. To create and carry out restrictions in trade in petroleum and its products, refined, illuminating and lubricating oil, in the United States, and in the domestic trade of the States thereof.

"2nd. To increase the price of petroleum and its products, same being commercial commodities and of prime necessity to the people.

"3rd. To prevent competition in the manufacture, sale, and purchase of petroleum and its products.

"4th. To fix at a standard figure the price of petroleum and its products, whereby the price of same to the public shall be controlled and established, petroleum and its products being commodities of merchandise, intended for use and sale in the State of Texas as well as other States.

"5th. For the purpose of agreeing, obligating and binding themselves not to sell, dispose of, or transport petroleum and its said products below a common standard figure, and to keep the price of petroleum and its products at a fixed or graded figure, and establish and settle the price of petroleum and its products between themselves and others, and to preclude a free and unrestricted competition among themselves and others in the sale of petroleum and its products, and for the purpose of pooling, combining and uniting any interests they should and did have in connection with the sale of petroleum and its products, that the prices of same might be affected.

"7½. Plaintiff avers that the parties to said agreement intended by said agreement and did thereby create and effect a combination of their capital, skill and acts to effectuate and carry out the above named purposes in reference to petroleum and its products in the domestic trade and commerce in the State of Texas in said articles or commodities; that petroleum and the products thereof, especially refined oils, illuminating oils, and lubricating oils, are commodities and articles of commerce and of prime necessity to the people of this State and generally used by them.

"8. Plaintiff further avers that the nine persons who were appointed and named as trustees in and under the provisions of said trust agreements accepted their several positions and entered upon the discharge of the trust duties therein mentioned; that some of said trustees and others, to the number of nine, whose names are unknown to the plaintiff, have been reappointed and appointed at various times since the execution of said trust agreements, so that nine trustees have been ever since then and still are acting thereunder, and each and all of said trustees have been and are nonresidents of the State of Texas; that the offices and principal place of business of said trustees, have been ever since the execution of said trust agreements and still are in the City of New York, and the elections of said trustees and business transacted at their meetings by them have been had and done in said City of New York.

"9. That since the date of said trust agreements and up to the present time the parties thereto, as above shown, have carried out, and are still carring out, observing and performing, its stipulations, contracts and agreements and the objects and purposes of same as above stated; that to facilitate the performance of the stipulations of said agreements and to aid in carrying out and accomplishing the unlawful purposes above set out and stated, the markets in the United States for the sale of petroleum and its products have been divided by the trustees appointed by and under said agreements into various subdivisions, and the territory embraced in each of said subdivisions allotted to some members or member of said trust agreement with exclusive right and privilege to sell and deal in petroleum and its products therein; that one of such subdivisions designated and established as aforesaid includes the following territory in the United States, to-wit, Southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory, and a part of Louisiana; that one of the means used by the parties to said trust agreements to carry out and accomplish the unlawful purposes above mentioned of their said unlawful trust or combination is that whenever in any part of the subdivision allotted to either of said parties as aforesaid any individual or corporation not a member of or acting under or in accordance with said trust agreements brought or shipped any of the products of petroleum into said subdivision, or sold or attempted to sell any of such products therein in competition with the members

of said trust aforesaid, the party to said trust agreement doing business in such subdivisions would immediately cut the prices of such products in the particular locality where competition existed, far below the market price of such products and below the reasonable cost of same, and refuse to sell to anyone buying the competitive products, so that the individual or corporation selling such products in such subdivision and to merchants or other persons buying same from such individual or corporation would be compelled to sell same, if at all, at a loss, and said party would keep the prices so cut, as aforesaid, until the parties dealing in such competitive products were driven out of the market in such subdivision and the merchant or dealer buying same ceased to attempt to deal therein, and then, when by such means competition in said subdivision was stifled and driven out, the member of and party to said trust agreement would immediately raise the price of such products above the fair market price of same; that the member of and party to said trust agreement is enabled to pursue the above tactics successfully and thus drive out and throttle competition by means of the assistance and the indemnity from loss assured by the combined power and wealth of all the parties to said trust agreement.

"10. Plaintiff avers, that in violation of law and in abuse of its corporate powers and in the exercise of privileges, rights and franchises not conferred upon it, defendant, the Waters-Pierce Oil Company, became a party to said trust agreement, and since the 6th day of July, 1889, has in the State of Texas, by and through the other defendants above named, and its numerous local agents in this State, diligently observed, performed and carried out the purposes, objects and policies of said agreements as above shown. Plaintiff avers that said defendant, the Waters-Pierce Oil Company's mode of dealing in the products of petroleum, to-wit, refined oils, illuminating oils and lubricating oils, in this State, is as follows: Said company has established in various localities in this State, warehouses, tanks and other depositories and places for the storage and reception of its oils. Said company ships its oils into this State consigned to its managers and other agents, and said oils are stored in the receptacles from which they are sold in said State to merchants and others dealing therein by such managers and agents in such quantities as the buyer desires to purchase. The exact time at which said Waters-Pierce Oil Company became a party to

and began acting in pursuance of said trust agreement, and began carrying out, observing and performing its purposes and objects as above shown, plaintiff is unable to state, but plaintiff alleges that since the date of said defendant's said permit to do business in this State, it has observed, performed and carried out said trust agreement and the purposes, policies and objects as above shown. That said defendant so entered into and became a party to and carried out and observed and performed the same, and is still doing so as follows, to-wit: A sufficient number of the owners and holders of its capital stock to control the corporate acts of said company including some of its officers and directors, entered into said agreement without attaching the corporate name and seal of said defendant thereto, and the official designation of its officers. That prior to such action by said owners of defendant's capital stock, defendant's capital stock consisted of a great number of shares, the exact number of which, and the amount of each share plaintiff is unable to state, and upon the entering into said agreement in the manner aforesaid the shares of stock of said defendant company belonging to the persons who entered into said agreement in manner above set out (in what proportion, however, plaintiff is unable to state), where transferred by defendant's transferring officers upon defendant's stock books to the certain nine trustees who have been appointed and named in accordance with the provisions of said trust agreements upon the request of the respective owners of said shares and in pursuance of said trust agreements. Plaintiff avers that the number and amount of said shares and the names of the owners of same so transferred to said trustees as aforesaid, and the times when same were respectively transferred, and the number and amount of said shares now held by said trustees is unknown to plaintiff, but said facts appear on the books of said defendant company, and defendant is notified to produce said books or certified copies from same showing the above facts on the trial of this case, or secondary evidence will be introduced of said facts on the trial of this case. Plaintiff avers that in lieu of the transfer of said shares as aforesaid to said nine trustees, certificates of said Standard Oil trust, which are provided for and described in said trust agreements, equal to the appraised value of the stocks of said defendant company delivered to said trustees, as aforesaid, *was* issued and delivered by said nine trustees to the persons aforesaid from whom said nine trustees had received shares of stock in defendant company. The appraised

value of said stocks so transferred to said trustee, as aforesaid, was determined in the manner set forth in said agreement. Plaintiff charges further that said trustees have, in addition to the mode above stated, under the power given them in said trust agreements, purchased other stocks and bonds of said Waters-Pierce Oil Company, and now hold the same, in addition to the stock so transferred to them as aforesaid. Plaintiff alleges that it does not know the number and value and amount of said stock and bonds so purchased by said nine trustees, but that same is known to said defendant and appears on its books, and defendant is notified to produce said books, or copies from same showing such facts on the trial of this case, or secondary evidence will be introduced of such facts. Plaintiff avers that the capital stock of said Waters-Pierce Oil Company is $400,000, and the said trustees before mentioned still hold and control the shares of stock thereof which were transferred to and purchased by them, as aforesaid; that the number, amount, and value of the shares of stock of defendant Waters-Pierce Oil Company transferred to and purchased and held by said trustees, as aforesaid, is and has been sufficient to enable said trustees to exercise a supervising and controlling authority and power over the affairs of said Waters-Pierce Oil Company and the management, conduct and control of its business; that by virtue of so holding and controlling said shares the said nine trustees acting under said trust agreements, have since July 6th, 1889, and are still able to and do control the action of defendant in the selection of its officers and directors and in the conduct and management of its business in this and other States; that defendant, said Waters-Pierce Oil Company, has never taken any corporate action or made any complaint against the said stockholders or its directors and officers signing said trust agreements, nor against its said stockholders or officers surrendering or selling their stock in said defendant company to said nine trustees, nor against its stockholders or officers or directors receiving the Standard Oil certificates which were issued and delivered to them as aforesaid by said nine trustees in exchange for the shares of said defendant's stock, nor against any of the acts herein recited, and that none of the officers, directors or stockholders of defendant company, have at any time objected to or made complaint against such surrender and exchange of stock or against any of said recited acts, and, on the contrary, defendant, in its corporate capacity and through its officers and stockholders, has, ever since the acts

in question, acquiesced in such transfer and exchange and in the control and supervision of the election of its officers and in the conduct and management of its business exercised by said nine trustees; that the directors of the defendant's company, either directly or through their employees, manage the business of said defendant's company so as not to conflict with the policy fixed from time to time by the nine trustees as aforesaid, and that the net earnings of the defendant company have been ever since the time its stockholders entered into said trust agreements as aforesaid, and still are from time to time declared and paid out as dividends upon its capital stock; that the nine trustees appointed under said agreements as aforesaid have received the proportions of such dividends which were properly distributable and payable upon the stock held by said nine trustees in defendant company; that there are a large number of other corporations and companies (plaintiff being unable to ascertain the exact number) in the United States, whose stock is held and directors elected and whose affairs and business and dividends are conducted and paid under and pursuant to the provisions of the said trust agreement in a manner and to an extent similar to that herein described in respect to defendant, and from the dividends so accumulated in the hands of the said nine trustees dividends are from time to time, as the interest of the trust justify, declared and paid out by said nine trustees to the holders of the Standard Oil trust certificates which have been issued by them, so that the holders of the shares of said Standard Oil certificates which were received in lieu of the number of shares of defendant's stock transferred in manner as aforesaid to said nine trustees do not receive the dividends which are payable from the earnings of defendant's company, but receive the dividends only from the accumulated earnings aforesaid which are derived from the various similar companies aforesaid and held and distributed as aforesaid by said nine trustees. Plaintiff further avers that said Waters-Pierce Oil Company, through its directors, officers and agents, conforms its corporate action to the policy fixed by said nine trustees under said trust agreement for the control of the corporations and parties thereto, and pursues, carries out and executes the purposes and objects of said trust agreement, as above set out, in this State; that in pursuance of the policy fixed by said trust agreement it has occupied and still occupies and carries on its business exclusively in the subdivision of the territory of the United States designated and outlined as afore-

said, to-wit, in Southwestern Missouri, Arkansas, Texas, Indian Territory, and Oklahoma Territory, in the United States, and that it does not invade or transact any of its business in any portion of the territory allotted to other members or parties to said trust agreement or compete with them in same; that none of the other members or parties to said trust agreement enter with their business or compete with said Waters-Pierce Oil Company in the sale of its oils or otherwise in the above territory allotted to and accepted by said Waters-Pierce Oil Company; that said Waters-Pierce Oil Company adopts and pursues and carries out in said territory the same methods of driving out and overcoming competition in the sale of oils therein as is adopted and pursued by other members of said trust agreement in the particular territory in the United States in which their respective business is pursued; that in the market of Texas, by reason of said trust agreement and the purposes and policies of same, there is no competition in the sale of oils or other products of petroleum between said Waters-Pierce Oil Company and any member or party to said trust agreements; that by reason of the facts above stated the said Waters-Pierce Oil Company has monopolized and still monopolizes and controls the trade in petroleum and its products in Texas, and is enabled to and does carry out, observe and perform the unlawful purposes of said trust agreements in reference to the trade in said commodities, which are of prime importance and necessity to the people of this State.

"11. Plaintiff further shows that since the 6th day of July, 1889, said defendant, Waters-Pierce Oil Company, has been engaged and is still engaged in dealing in and selling the products of petroleum, such as refined oils, illuminating and lubricating oils, in this State; that during said time said company has made, and is still making, through its agents and officers in this State, contracts and agreements by and between it and various merchants and others dealing in, buying and selling similar oils in this State, by the terms of which agreements and contracts said merchants and other dealers in said commodities, in consideration that said defendant company would pay them a small rebate on the oil purchased by them or for other considerations unknown to plaintiff, agreed and contracted to and with said company that they would not buy any oils from any other company, person or corporation, but would deal with and buy and sell oils obtained from said defendant company exclusively; that said contracts so made, as aforesaid,

between said defendant company, through its agents and officers, and said merchants and other dealers in such oils are and were sometimes verbal and sometimes in writing; that among the merchants and other dealers in this State with whom defendant company has entered into and made such contracts are the following, to-wit:

"B. P. Stephenson, a resident of Yoakum, DeWitt county, Texas, said contract being made in the year 1892 or 1893; Hair & Gray, residents of Belton, Bell county, Texas, said contracts being entered into about July, 1894; Stayton & Howard, of McLennan county, Texas, said contract being made in 1892; E. F. Ehlinger, of Goliad county, Texas, said contract being made in the year 1892; E. A. Arnin, of Fayette county, Texas, said contract being made in the year 1894; H. Becker, of Washington county, Texas, said contract being made in the year 1893; H. Lillienstein, of Titus county, Texas, said contract being made in the year 1895; John Shumaker & Co., White & Bradshaw, and C. J. Rosenberg, of LaGrange, Fayette county, Texas; F. M. Ramsey, W. C. Burr, Laredo, Texas.

"12. Plaintiff avers that said defendant company through its officers and agents since said 6th day of July, 1889, has made and still is entering into and making contracts and agreements both verbal and in writing with various and sundry merchants and others dealing in, buying and selling oils, the product of petroleum, in this State, by the terms of which said merchants and others dealing in such oils as aforesaid contracted and agreed with said defendant company to buy from and sell the oils of said company exclusively, and in some instances further agreed not to sell the oils so bought as aforesaid from said defendant company to anyone buying from or dealing with any other person or corporation dealing in such oils in competition with said defendant company. That among the merchants and other dealers with whom such contracts were made and the time and place when same were made and entered into are the following, to-wit:

"W. A. Bryan, of McLennan county, Texas, in 1892 and 1893.

"J. W. Thomason, of McLennan county, Texas, in 1894.

"Herman Voss, of Coryell county, Texas, in August, 1893.

"Hair & Gray, of Bell county, Texas, in 1894.

"W. N. Foster, of Brazos county, Texas, in 1892.

"T. A. Fuller, of Bowie county, Texas, in 1891.

"13. Plaintiff further avers that said defendant company since

July 6th, 1889, has made and entered into, and still is making and entering into, through its officers and agents in this State, agreements and contracts by and between it and various merchants and others dealing in and buying and selling oils, the products of petroleum, by the terms of which said merchants and others dealing in such oils contract and agree with said defendant company after purchasing from it its said oils to sell the same to others desiring to purchase from them at prices fixed and established by it or its agents and officers. That among the merchants and other dealers so making and entering into such contracts are the following, to-wit:

"W. A. Bryan, a resident of McLennan county, Texas, said contract made in 1892 or 1893.

"W. F. Manning, a resident of Caldwell county, Texas, said contract made in the latter part of 1892.

"H. Schmidt, a resident of Robertson county, Texas, said contract made about the year 1892 or 1893.

"14. Plaintiff avers that prior to July 6th, 1889, to-wit, about the year 1881, the said defendant company entered into a contract in writing with certain jobbers and wholesale merchants in the city of Brownsville, Texas, among whom was the firm of Bloomberg & Raphael, by which said defendant company purchased the oil of said firm then on hand, and said firm of Bloomberg & Raphael agreed and became bound to purchase from said defendant company all future requirements of oil at prices established by said defendant company and its agents. From which prices said firm was to receive a rebate of fifteen cents per box on making settlement therefor at the end of each month. Said rebate to be extended only to those who are parties to said contract, and said jobbers and wholesalers and said firm of Bloomberg & Raphael were to sell said oil to retail dealers at the invoice price of same fixed by said defendant company. That plaintiff is unable to give a better description of said contract for the reason the same is in the possession of the defendant. Plaintiff further alleges that after the 6th day of July, 1889, the said defendant carried out and continued to do business with said firm under said contract until about the 6th day of October, 1896, insisted upon all its provisions.

"15. Plaintiff also avers that said defendant company on or about January 1st, 1890, entered into a contract in writing with J. S. & M. H. Cross, wholesale merchants in the city of Brownsville,

whereby it was agreed that said firm was to buy all oil needed in its business from said defendant company, and the said dealers were to receive from said defendant one and one-half cents per gallon rebate and said firm further agreeing not to sell oil for a price less than the schedule invoice price of said company, said contract by its provisions could be cancelled by notifying the company ten days in advance. By the terms of said contract said firm became bound to buy all its oils from said defendant, and were also bound to sell at a price fixed by said defendant, and that under said contract the said defendant has been since said date doing business with said firm.

"16. That since July 6th, 1889, the said defendant company has been selling oil to J. H. Fernandez, a merchant in the city of Brownsville, under a contract in writing by which said Fernandez was to buy all oil bought by him in his business from said defendant company, and was to receive from said company a rebate of fifteen cents per box on the invoice price, and it was further agreed that said Fernandez shall sell oil at a price fixed by said defendant company, and in case oil was purchased from any one else said merchant was subject to pay the said defendant company a penalty in money. That under said contract said defendant company did business with said merchant until about December 23rd, 1896.

"17. That plaintiff alleges that previous to December 24th, 1896, the said defendant company had for many years been doing business and selling oil to M. Alonzo and other mershants in the city of Brownsville, Texas, under a contract in writing with said parties, duly executed, by which said Alonzo and also said other merchants agreed to buy all their oils used in their business respectively from said defendant company, and was to receive a rebate of twenty cents per box on the better quality and fifteen cents per box on common oil, and the said defendant agreed to make a reduction on the price of oil in case there was other oil on the market selling at a lower price than the company's price. The contract could be cancelled by giving the company ten days notice, and said company fixed the minimum price at which said oil could be sold by said merchants; that under said contract said parties thereto did business thereunder and in said manner until said December 24th, 1896.

"18. That previous to December 24th, 1896, the said defendant company had for many years been doing business with and

selling oil to Nicholas Lopez of the city of Brownsville, Texas, under a contract in writing by which said Lopez was to buy all his oil from said company and was to receive a rebate of fifteen cents per box on all oil purchased by him from said company, said contract to be cancelled at any time by giving ten days notice to said company, and said Lopez was further required to sell no oil at a price less than the invoice price and by the terms of said contract said Lopez was subject to a penalty of twenty-five dollars in case he purchased oil from any one else other than said company defendant; that under said contract said parties did business thereunder and in the manner mentioned therein until December 24th. 1896.

"19. That for about three years prior to October 8th, 1896, the said defendant company did business with and sold oil to Miguel Fernandez, a merchant in the city of Brownsville, under a contract in writing stipulating that said merchant should buy all his oils from said defendant company and receive a discount of fifteen cents per box upon the invoice price, and was bound thereby not to sell oil for less price tha nthe invoice price under a penalty of fifty dollars payable to said defendant company.

"20. That defendant company is seeking to renew all of said contracts above alleged as having been cancelled and is seeking to carry on its said business in said city under same.

"21. Plaintiff avers that all of such contracts as alleged and above described were made by the agents of said defendant company and were authorized by it, and were fully ratified and carried out by said company after same had been so made. The plaintiff cannot give more definitely the terms, considerations and dates of such contracts than as above given, because same are unknown to plaintiff. Plaintiff notifies said defendant to produce on the trial of this case the written contracts or copies of same made by it as above alleged with said merchants and others dealing in said oils, or secondary evidence of their contents will be introduced on the trial of this case.

"22. Plaintiff further shows that the Eagle Refining Company was and is a private corporation legally incorporated under the laws of the State of Ohio; that its principal office and officers are located in the city of Cleveland, Ohio; that the capital stock of said corporation was and is the sum of fifty thousand dollars; that the purposes and objects for which said company was incorporated and

formed was and is to manufacture, refine, compound, purchase and deal in all kinds of oils and greases, petroleum and its various products and all things incident thereto for profit. Plaintiff avers that it does not know the names and residence of its officers or any of its agents; that it is informed and so states that it has now no officers or agents in this State; that on, to-wit, the 6th day of November, A. D. 1891, said company filed in the Department of State in the State of Texas, a certified copy of its articles of incorporation, in accordance with the requirements of law, and paid the fee required by law and obtained a permit to carry on its business in this State; that under and by virtue of said authority so obtained as aforesaid said company, on said date, began to transact business in this State; that from said date said company began to pursue and carry on the business in this State of dealing in selling and trading the products of petroleum consisting of refined, illuminating and other oils, in honest and sharp competition with said Waters-Pierce Oil Company; that said corporation continued to pursue and carry on said business in its name in this State from said date up to about the 13th day of October, 1894, at which date the said Eagle Refining Company and th said Waters-Pierce Oil Company made and entered into a certain agreement, combination and trust, the exact terms of which are unknown to your petitioner, but petitioner charges that same was in writing, and the said defendant is hereby notified to produce same, or a certified copy thereof, on the trial of this cause, or secondary evidence of its contents will be introduced. Plaintiff alleges that by the terms of said agreement the Waters-Pierce Oil Company bought, obtained or leased, or secured the control of all the property and business and franchises of said Eagle Refining Company in said State of Texas and other States, and obtained and secured the exclusive right to operate its business and exercise its privileges and franchises and use its name, labels and trade-marks in this State and other States, and the said Eagle Refining Company agreed to withdraw from doing any business in said State in competition with said Waters-Pierce Oil Company for the period of fifteen years; that since said date said Waters-Pierce Oil Company has been doing business in this State in the name of the Eagle Refining Company, said business being carried on in apparent but not real competition with said Waters-Pierce Oil Company and said business consisting of dealing in and selling the products of petroleum, refined oils, lubricating and illuminating oils. Plaintiff

avers that the said Waters-Pierce Oil Company and said Eagle Refining Company were and are corporations engaged in the same line of business, and that said contract or agreement above stated affected the production of petroleum and also affected the sale of its products in this State, said petroleum and its products being articles of such general use that the public is interested in the production and sale of same.

"23. Plaintiff further avers that previous to the year 1890 one C. W. Robinson, a resident of Houston, Harris county, Texas, in this State, was engaged independently and in his own name and for himself and dealing in, buying and selling various kinds of oil, the products of petroleum, in this State, in competition with said Waters-Pierce Oil Company; that about the —— day of 1890, the said C. W. Robinson and Waters-Pierce Oil Company made and entered into an agreement by the terms of which the said Waters-Pierce Oil Company obtained and secured the control, management and conduct of the said business of C. W. Robinson, and by the terms of which, though said business is conducted in the name of C. W. Robinson, as before said date, yet same is really controlled and conducted by said Waters-Pierce Oil Company; that by the terms of said contract and agrement the said C. W. Robinson is to buy and sell exclusively the oils of said Waters-Pierce Oil Company, and refrain from dealing in, buying or selling any oils obtained from any other course; that by the terms of said contract the said business of C. W. Robinson is carried on in the name of C. W. Robinson, and in apparent but not real competition with the Waters-Pierce Oil Company; that said contract and agreement has been since the said date of the making of same and still is in full force and effect.

"24. Plaintiff avers and charges that the above described contracts and agreements by and between the said defendant, Waters-Pierce Oil Company, and the various merchants and others dealing in oils in this State, and particularly the above described agreement by and between said company and the Eagle Refining Company and the above described agreement by and between Waters-Pierce Oil Company and said C. W. Robinson, were each and all intended to and did create and result in a combination of their capital, skill and acts of said Waters-Pierce Oil Company, and said several merchants and others dealing in oils in this State and between said Waters-Pierce Oil Company and said Eagle Refining Company and betwen

said Waters-Pierce Oil Company and said C. W. Robinson for the following purposes, to-wit:

"1st. To create and carry out restrictions in trade, to-wit, in the buying and selling of products of petroleum, refined oils, illuminating oils in this State.

"2nd. To increase the price of said products of petroleum in this State.

"3rd. To prevent competition in the sale and purchase of petroleum and its products in this State.

"4th. To fix at a standard or figure the price of said petroleum and its products whereby its price to the public should be controlled and established.

"5th. For the purpose of binding and obligating said parties to said agreements not to sell and dispose of petroleum and its said products below a common standard figure and to keep the price of same at a fixed or graded figure and to establish and settle the price of said petroleum and its products between themselves and others so as to preclude free and unrestricted competition among themselves and others in the sale of same, and to pool and combine and unite their interests in the sale of same that its price might be affected.

"Plaintiff alleges that petroleum and its products are commodities and articles of merchandise of prime necessity to the people and generally used and consumed by them, and are commodities intended for sale, use and consumption in this State; that said agreement and contracts resulted in effecting and carrying out said above named purposes to the great injury and detriment of the people of this State.

"25. Plaintiff further avers that said Waters-Pierce Oil Company, since the date of its said permit to transact its busines in this State, has been and is now guilty of gross abuse and misuse of its chartered privileges and franchises in this State, for plaintiff says that in order to monopolize and control the oil trade in this State said Waters-Pierce Oil Company, through its officers and agents, has unlawfully entered into and carried out the said contracts and agreements above set forth, and has entered into and is still engaged in making and carrying out similar contracts and agreements with other merchants and dealers in oils in this State; that the course of business pursued by said company in this State is as follows: Whenever in any locality in this State any person or corporation

sells or buys the products of petroleum obtained from any person or corporation except said Waters-Pierce Oil Company or deals in oils in competition with said company said Waters-Pierce Oil Company, through its agents and officers, immediately cuts the price of its oils below the reasonable and fair market price of same, and refuses to sell the same at all or except at an exhorbitant and higher price than the price at which it sells to those dealing exclusively with it, to those merchants or other dealers who buy such competitive oils; that at said times and places said Waters-Pierce Oil Company, through its officers and agents pursues and carries out a system of threats and intimidation and bribery to prevent parties dealing in oils in this State from buying and selling competitive oils, for plaintiff says said Waters-Pierce Oil Company, through its officers and agents, refuses to sell its oils to parties buying any competitive oils, threatens said parties intending to or purchasing such competitive oils with a ruinous reduction in the price of said oils and with loss to them in dealing in same, and pays rebates in the price of oils to induce buyers of oils not to patronize a competitor in its business, and by offers of money or the payment of the expense incident thereto seeks to get and does induce parties ordering such competitive oils for the purpose of selling same to countermand such orders and refuse to take same after entering into a contract to purchase. Plaintiff alleges that the above is the general course of dealing pursued throughout this State by said Waters-Pierce Oil Company, through its agents and officers, in the transaction of its business; that after the competitive oil is by such methods driven out of the markets in this State the said Waters-Pierce Oil Company, through its officers and agents, immediately raises the price of its oils far above the true and reasonable market value of same, and extort such unreasonable and exorbitant prices from the consumers of oil in this State, and keeps its oil at such prices.

"That the above stated course of dealing by said Waters-Pierce Oil Company has resulted in the complete monopolization by said company of the oil trade of this State and in stifling and throttling legitimate competition in same, to the great injury of the people of this State.

"26. Plaintiff avers that by reason of the contracts, agreements, combinations and trusts made and entered into by said Waters-Pierce-Oil Company, through its stockholders, officers, directors, and agents, as above alleged and shown, and by reason of the gross abuse

and misuses by said Waters-Pierce Oil Company of its corporate privileges and franchises in this State, as above shown, said Waters-Pierce Oil Company has forfeited its right and permit to do business in this State; that the said unlawful combinations, agreements, conspiracies and trusts, made and entered into and carried out by said defendant company and its officers and agents in this State, and said abuses and misuse of its corporate powers by said company, as above stated and shown, are frauds upon this State, in violation and contravention of its laws, in restraint of trade, destructive of competition, and tends to and do create a monopoly in this State, and that same now are and unless prohibited will continue to be grievous burdens upon the people of this State and the public, and are against public policy and should be restrained."

The statement of the pleadings of defendant, as contained in brief of plaintiffs in error, is substantially correct, and therefore will not be repeated here.

The case was tried on the 15th of June, 1897. Defendant, among other things, made the following written admission:

"It is agreed by and between the parties hereto as follows:

"1. The allegations made in paragraphs 1, 22 3 and 4 of plaintiff's first amended original petition are admitted to be true.

"2. The facts alleged in paragraph 5 are admitted, but the allegations or conclusion that such facts constituted an unlawful combination or trust is denied.

"3. The facts and allegations, including the agreement, set out and stated in paragraph 6 of said amended petition are admitted, except that it is not admitted that said facts or agreements constituted an unlawful combination, trust or agreement.

"4. It is agreed that the printed copy of an agreement of the Standard Oil trust and the proceedings of the certificate holders entered into in the City of New York on the 21st day of March, 1892, providing for the dissolution of the trust and the winding up of its affairs, shall be admitted in evidence, it being the same agreement, and the proceedings agreed to be admitted in the case of the State of Texas vs. E. T. Hathaway, et al., tried in the district court of McLennan county, Texas.

"5. The facts and allegations made in paragraph 8 of plaintiff's said amended petition are admitted.

"6. In relation to paragraph 9, it is admitted that the Waters-Pierce Oil Company sells illuminating oils in southern Missouri, Arkansas, Louisiana west of the Mississippi river, Texas, Indian Territory, and in Old Mexico, without competition therein on the part of any of the persons, companies, and corporations mentioned in paragraph 6 of the bill, and that the Waters-Pierce Oil Company does not sell said oils elsewhere."

The companies referred to in the paragraph of the agreement last quoted, and set forth in paragraph 6 of said first amended original petition, are as follows: Acme Oil Company (New York); Acme Oil Company (Pennsylvania); Atlantic Refining Company

of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Company, Elizabethport Acid Works, Imperial Refining Company, Limited; Chas. Pratt & Co., Paine Ablett & Co., Limited; Standard Oil Company (Ohio); Standard Oil Company (Pittsburg); Smith's Ferry Oil Trans. Company, Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited; American Lubricating Oil Company, Baltimore United Oil Company, Beacon Oil Company, Bush & Deanslow Manufacturing Company, Central Refining Co., of Pittsburg; Cheseborough Manufacturing Company, Chess-Carley Co.,Consolidated Tank Line Co., Inland Oil Co., Keystone Refining Co., Maverick Oil Co., National Transit Co., Portland Kerosene Oil Co., Producers' Consolidated Land and Petroleum Co., Signal Oil Works, Limited; Thompson & Bedford Co., Limited; Devoe Manufacturing Co., Eclipse Lubricating Oil Co., Limited; Empire Refining Co., Limited; Franklin Pipe Co., Limited; Galena Oil Works, Limited; Galena Farm Oil Co., Limited; Germania Mining Co., Vacuum Oil Co., H. C. Tan Vine & Co., Limited.

The court instructed the jury that the evildence was not sufficient to show that the Waters-Pierce Oil Company was a member of the Standard Oil trust in such a manner that violated the trust laws of the State, and that all testimony upon that branch of the case would, therefore, be disregarded. (R., p. 48, Subdivision 17.)

The court also instructed the jury that the agreement with the Eagle Refining Company, C. W. Robinson, J. L. Lewis and Stilwell Bros. were not violative of the law and evidence in reference to these matters was to be considered only as to the course of dealing of the defendant company in the State. (R., p. 48, Subdivision 18.)

The court also instructed the jury to find for the defendants Hathaway, Austin, Grice, Keenan and Fries, as they were only agents of the defendant company and not liable in the forms charged in the suit. (R., p. 49, Subdivision 21.)

Numerous instructions were requested by both sides and refused by the court. A verdict was rendered in favor of the State against the Waters-Pierce Oil Company and a judgment rendered enjoining it and cancelling its permit to do business within the State and perpetually enjoining and restraining it and its agents from doing business within the State. The judgment further provided that nothing therein should be construed to in any way affect, apply or pro-

hibit the defendant's right to engage in interstate commerce. (R., pp. 41 and 42.)

The case was appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, and by that court affirmed, after motions for new trial and motions for arrest of judgment had been made and overruled in the court below. The judgment of the trial court was affirmed by that court. (R., p. 180.) The opinion of the court of civil appeals affirming the case will be found in the record, pages 161 to 179 inclusive. Motion for rehearing was made and overruled. (R., p. 180.) Petition for writ of error was filed in the supreme court. (R., p. 196.) Writ of error was refused by that court. (R., p. 207.) Motion for rehearing was made in the supreme court, which was overruled. (R., pp. 208 to 211.) The case was brought here by writ of error by the Waters-Pierce Oil Company, assigning the following errors:

"I.

"The court of civil appeals of the State of Texas erred in holding with the trial court that the statutes of the State of Texas of 1889 and 1895, commonly known as the anti-trust acts, were not violative of the Constitution of the United States, because said acts expressly discriminate in their operation and effect between persons and classes and deny to many persons and classes of persons the equal protection of the laws. They prescribe penalties of felony against artisans, mechanics, merchants, and professional men for acts which they expressly authorize farmers and stock raisers to do. Such distinction is purely arbitrary, without reason for its support, vicious in purpose, and expressly violative of the fourteenth amendment to the Constitution of the United States.

"II.

"The court further erred in holding that said acts did not violate the Constitution of the United States, because said acts did not exempt, except indirectly, certain classes of citizenship from their operation, but they exempted certain classes of property, the annual earnings of the farmer and stock raiser, from denunciation while such earnings remain in the hands of the original producer and raiser, and they also exempt laborers who may combine for the purpose of raising their wages. While the natural effect of these laws is to practically exempt some farmers and stock raisers under certain state of circumstances from the pains and penalties of combination for the purpose of affecting prices, yet all farmers and all stock raisers are not treated alike, even with reference to their annual earnings. There is, therefore, an absence of that classification upon which the court reposes for the justification of its ruling.

"III.

"The court further erred in holding said statutes not violative of the Constitution of the United States, because they in their natural operation and effect deprive many citizens and persons of their property and liberty without due process of law. They deprive many persons and citizens of the same right and liberty of contract with reference to their property and business affairs which they guarantee to other persons and citizens, and they take from many

persons and citizens their rights of property by mere statutory enactment, without due condemnation, according to the law of the land.

"IV.

"The court further erred in holding that said statutes were not violative of the Constitution of the United States, because said statutes (Section 4) assume the power of the State to deny to every foreign corporation the right to do any business in Texas, interstate or otherwise, and it was not competent for the trial court or court of civil appeals of the State of Texas by judicial limitation, as was attempted and had in this case, to restrict the operation of said sections to local business alone, as said section in each act must be construed as an entirety and are not separable by judicial construction so as to eliminate a manifest unconstitutionality as to the jurisdiction of the State and her courts, and to validate by judicial construction portions of the section as applicable solely to local business.

"V.

"The court further erred in holding said statutes not to be violative of the solely to local business.
Constitution of the United States, because said statutes usurp and were intended to usurp the authority and jurisdiction of the United States and the other States in the matter of prosecution for acts occurring beyond the territorial limits of the State of Texas.

"VI.

"The court erred in holding with the trial court that the case at bar was a controversy of a civil nature and in approving the ruling of the court below in refusing to instruct the jury, upon request by plaintiff in error, that if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of the plaintiff in error with any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature."

The anti-trust statute originally passed in 1889 by the Texas Legislature reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That a trust is a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce, intended for sale, use, or consumption in this State. Fifth—To make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of

any such article or commodity that its price might in any manner be affected.

"Sec. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the Attorney-General or District or County Attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

"Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State; and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the District Court of Travis county, in the name of the State of Texas.

"Sec. 5. That the provisions of Chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

"Sec. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder, or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

"Sec. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created.

"Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belong to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"Sec. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions whether within or without the State.

"Sec. 10. Each and every firm, person, corporation, or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney-General or the District or the County Attorney to prosecute for and recover the same.

"Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

"Sec. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

"Approved March 30th, 1889. Acts of 1889, p. 141."

In 1895 another act was passed by the Texas Legislature which reads as follows:

"TRUSTS.

"Chapter 83.—[H. B. No. 404.] An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act.

"Section 1. Be it enacted by the Legislature of the State of Texas: That an act entitled 'An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas,' approved March 30, 1889, be so amended as to hereafter read as follows:

"Section 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade (or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State).

"2. To increase or reduce the price of merchandise, produce or commodities.

"3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, (or to prevent competition in aids to commerce).

"4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

"5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

"Sec. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

"Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the Attorney-General or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or quo warranto proceedings in Travis county, at Austin, or at the county seat of any county in the State where such corporation exists, does business or may have a domicile,

for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

"Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proper proceedings in the district court of Travis county, in the name of the State of Texas.

"Sec. 5. That the provisions of chapter 48, general laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

"Sec. 6. If any person shall be or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any or all of the following purposes:

"1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

"2. To increase or reduce the price of merchandise, produce or commodities.

"3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

"4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

"5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant or employe, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations, shall be punished by fine of not less than fifty nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

"Sec. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

"Sec. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

"Sec. 9. Persons out of the State may commit and be liable to indictment

and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State.

"Sec. 10. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney-General or the district or county attorney to prosecute for and recover the same.

"Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State; provided, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

"Sec. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the State to recover penalties, or to affect the right of the State to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this State, or affect the right of the State to maintain prosecutions for violations thereof, under any law of this State relating to trusts, for acts heretofore done.

"Sec. 14. Any court, officer or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury may subpoena persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections about which he may testify fully and without reservation.

"Sec. 15. All laws or parts of laws in conflict with this act are hereby repealed.

"Sec. 16. Whereas, the people of this State are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule which requires that all bills shall be read on three several days be suspended, and it is so enacted.

"Approved April 30, 1895."

Both of these acts were assailed in the assignments of error. The act of 1889 is not expressly repealed. If the act of 1895 is valid it of course impliedly repealed the act of 1889 in so far as they are in conflict. If the act of 1895 is invalid, it is incapable of repealing the act of 1889, and, therefore, leaves it in force.

The statutes in question are police regulations.

While it is difficult to get an exact definition of "police power," applicable to all cases, it is not necessary to do so in this instance. Mr. Cooley has stated that the term has been defined as "the general power of the government to preserve and promote the public welfare, even at the expense of private rights." (Cooley's Consti-

tutional Limitations, 6th ed., 624; Tiedman's Limitations of Police Power, Sec. 1.)

From this definition it would appear that if the public welfare can be best promoted by preventing the character of contracts which these statutes seek to prohibit, certainly they should be classified as police regulations.

The Supreme Court of Louisiana said:

"Police power is the right of State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution." (N. O. Gas Lighting Co. vs. Hart, 40 La. Annl., 474.)

This court has said:

"Every law comes within this description (of police regulations) which concerns the welfare of the whole people of the State, or any individual within it; whether it relates to their rights or their duties; whether it respects them as men or citizens of the State; whether in their public or private relations; whether it relates to the rights of persons or property, of the whole people of a State, or of any individual within it; and whose operation is within the territorial limits of the State, and upon persons and things within its jurisdiction." (Mayor of New York vs. Miln, 11 Pet., 139.)

The Supreme Court of Maine has said:

"With the legislature, the maxim of law, salus populi suprema lex, should not be disregarded. * * * How far the provisions of a legislative act extend is always submitted to its discretion; provided these acts do not go beyond the great principle of securing the public safety." (State vs. Noyes, 47 Me., 211.)

The Supreme Court of Illinois said:

"The police power of a State is co-extensive with self-protection, and is not inapplicably termed the 'law of overruling necessity.' It is the inherent and plenary power of the State which enables it to prohibit all things hurtful to the comfort and welfare of society." (Lake View vs. Rose Hill Cemetery Co., 70 Ill., 192.)

The following cases likewise give definitions of police power not inapplicable to the case at bar:

Stone vs. Mississippi, 101 U. S., 814.
Boston Beer Co. vs. Massachusetts, 97 U. S., 25.
Commonwealth vs. Alger, 7 Cush. (Mass.), 84.
Thorpe vs. Rutland R. R. Co., 27 Vt., 149.

Cases discussing police regulations in the form of quarantine laws and in the regulation of slaughter houses, fairly illustrate the right of a State to pass the statutes under discussion.

Slaughter House Cases, 16 Wall., 36.
Butchers' Union, etc., Co. vs. Cresson City, etc., 111 U. S., 746.

New Orleans vs. Stafford, 27 La. Annl., 417.
Cooley's Constitutional Limitations, 4 Ed., 506.
State vs. Natal, 39 La. Annl., 439.

In the exercise of this power States have a right to forbid the adulteration of food products.

State vs. Campbell, 64 N. H., 402.
People vs. West, 44 Hun., 162.
People vs. Arensberg, 105 N. Y., 123.
Waterbury vs. Newton, 50 N. J. L., 534.
By the same power water sources are preserved from polution.
State vs. Wheeler, 44 N. J. L., 88.

Burial grounds are located and drainage systems are inaugurated by virtue of this power.

Commonwealth vs. Waite, 11 Allen (Mass.), 264.
State vs. Campbell, supra.

By the same power all acts deemed injurious to public morals are prohibited.

Thompson vs. State, 17 Texas Appeals, 253.
Cooley's Constitutional Limitations, 4 Ed., 596.

But it must not be supposed for a moment that the police power is exhausted when all matters pertaining to health and morals are adjusted. By the exercise of this power all business enterprises may be regulated, so as to best secure the general welfare of the people. Thus all charges made by ferrymen, common carriers, hackmen, bakers, wharfingers, hotels, etc., may be regulated by law under a proper exercise of the police power of the state.

Munn vs Illinois, 94 U. S., 113.
Chicago R. R. Co. vs. Iowa, 94 U. S., 155.
Stone vs. Wisconsin, 94 U. S., 181.
People vs. Budd, 117 N. Y., 1.
Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362.

The State may by the same power regulate the hours that women and children may lador in manufacturing establishments, and also to provide for the manner in which they shall be paid.

Commonwealth vs. Hamilton Mfg. Co., 120 Mass., 383.
Shaffer vs. Union Mining Co., 55 Md., 74.

States may also, by the same power, regulate the amount of interest that may be charged.

Cooley's Principles of Constitutional Law, 235.

All laws prohibiting the erection of wooden buildings within certain limits are based upon the same principle.

Whether the statutes in question be tested by definitions or illustrations, they should be conceded to be police regulations; and if constitutional must be held valid, whether deemed by this court to be wise or unwise. A police power can be exercised only by legislative enactment, and it lies solely within the legislative discretion to determine when the public welfare or safety requires its exercise.

Munn vs. Illinois, 94 U. S., 113.

Courts are not authorized to interfere with the exercise of this power except when the act in question conflicts with either the State or Federal Constitution.

Munn vs. People, 69 Ill., 93.
Lake View vs. Rose Hill Cemetery Co., 70 Ill., 192.
Goddard vs. Jacksonville, 15 Ill., 588.
Soon Hing vs. Crowley, 113 U. S., 703, 710.

This court has held that a large measure of discretion "is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Lawton vs. Steele, 152 U. S., 133, 136.
Holden vs. Hardy, 169 U. S., 392.

Is the act of 1889 void because of the provision that it shall not apply to agricultural products or live-stock while in the hands of the producers or raisers? and is the act of 1895 void because of the same exceptions, with the additional one that it shall not be construed so as to prevent the organization of laborers for the purpose of maintaining any standard of wages?

The contention of counsel for appellant is that these provisions make both statutes void. Broadly stated, the contention of appellant's counsel is that the statutes are void because not applicable to all persons and to all classes of property however situated, if found

within the State of Texas. They ignore the doctrine that this court has so well stated,—that a statute need not apply to all persons or all classes of property in order to conform to the Fourteenth Amendment to the Federal Constitution. The language of this court is:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit a law which is limited either in the *objects* to which it is directed, or by the *territory in which it is to operate*. It merely requires that all persons subject to such legislation *shall be treated alike under like circumstances and conditions*, both in privileges conferred and liabilities imposed." (Hays vs. Missouri, 120 U. S., 71.)

To the same effect are the following authorities:

Railway vs. Mathews, 165 U. S., 1.
Holden vs. Hardy, 169 U. S., 366, 380.
Jones vs. Brim, 165 U. S., 180, 181.
State Railway Tax Cases, 92 U. S., 576.
Kentucky Tax Case, 115 U. S., 321.
Pacific Express Company vs. Seibert, 142 U. S., 339.
Natal vs. Louisiana, 139 U. S., 621.
Crowley vs. Christensen, 137 U. S., 86.
Kidd vs. Pearson, 128 U. S., 1.
C., B. & Q. Railway Company vs. Iowa, 94 U. S., 155.
Mugler vs. Kansas, 123 U. S., 623.
Minneapolis & St. L. Railway Co. vs. Beckwith, 129 U. S., 26.
ome Insurance Co. vs. New York, 134 U. S., 594.
Giozza vs. Tiernan, 148 U. S., 660.
Railway Company vs. Macay, 127 U. S., 205.
In re Kemler, 136 U. S., 436.
Railway Company vs. Humes, 115 U. S., 512.
Barbier vs. Connollee, 113 U. S., 27.
Soon Hing vs. Crowley, 113 U. S., 708-9.
Railway Company vs. Gibbes, 142 U. S., 386.
Southerland on Statutory Construction, Secs. 125-6-7.

The power of the legislature to pass laws applicable to certain classes of persons or property only has always been recognized, provided the discriminations made are not arbitrary. The mere fact that a law is not applicable to every class of property and to all persons in every condition does not bring it in conflict with the Fourteenth Amendment. It is upon this principle that statutes fixing

the terms upon which foreign corporations may come within the limits of the State and do business have been maintained.

Pembina Mfg. Co. vs Pennsylvania, 128 U. S., 183.
Payne vs. Virginia, 8 Wall., 168.
Bank vs. Earle, 8 Wall., 168.
Lafayette Ins. Co. vs. French, 18 How., 404.
Ducat vs. Chicago, 10 Wall., 410.
St. Clair vs Cox, 106 U. S., 350.

Statutes regulating liquor dealers, though applicable to no other class of dealers, are valid.

Giozza vs. Tiernan, 148 U. S., 660.
Crowley vs. Christensen, 137 U. S., 86.
Kidd vs. Pearson, 128 U. S., 1.
Mugler vs. Kansas, 123 U. S., 623.
License Tax Cases, 5 Wall., 469.
Crowley vs. Christensen, 137 U. S., 86, 89.

A statute making necessary certain preliminary acts before electric railways can be constructed has been upheld, though in terms not applicable to any other class of railways.

Railway Company vs. Squires, 145 U. S., 175.

A statute which imposes the burden of supporting a railway commission on the railroads alone this court has held valid.

Railway Company vs. Gibbs, 142 U. S., 386.

Legislative enactments providing rules for the assessment of railroad property different from those for the assessment of other property have been upheld.

State Railway Tax Cases, 92 U. S., 576.
Kentucky Tax Cases, 115 U. S., 321, 337.
Bells Gap Railway Co. vs Pennsylvania, 134 U. S., 233, 237.

The same doctrine is announced with reference to other corporations.

Home Insurance Company vs. New York, 134 U. S., 607.
Pacific Express Co. vs. Seibert, 142 U. S., 339, 351.

Graduated inheritance taxes have been upheld.
Magoun vs. Ill. Trust & Savings Bank, 170 U. S., 283, 287.
U. S. vs. Perkins, 163 U. S., 625, 628.
U. S. vs. Fox, 94 U. S., 315, 320.
Mager vs. Grima, 8 How., 490, 493.

The doctrine of these tax cases applies to police regulations as well; different police regulations may be applied to one class of property than those necessary for or applicable to others.

M. & St. L. Ry. Co. vs. Beckwith, 129 U. S., 26.
Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 512.
Railway Company vs. Macay, 127 U. S., 205.

Indeed the whole problem of railway regulation is based upon the proposition that the government has the right to enact rules for their guidance not applicable to any other class of business. The same principle is recognized in what is known as the laundry cases.

Barbior vs. Connollee, 113 U. S., 27.
Soon Hing vs. Crowley, 113 U. S., 709.
Commonwealth vs. Waite, 11 Allen, 264.
State vs. Campbell, 64 N. H., 402.

Statutes requiring separate coaches for colored and white passengers are based upon the same reason.

Railway Company vs. Mississippi, 66 Miss., 662; 1b., 133 U. S., 587.

Supporting this doctrine are the celebrated Granger Cases, decided by this court (94 U. S., 113), as well as Budd vs. New York, 143 U. S., 517. The case last cited involved the New York grain elevator law. And in the case of Brass vs. North Dakota, involving the Dakota elevator law, the same proposition was announced. (153 U. S., 391.)

Laws regulating telephone charges have been upheld, though applicable to no other class of business.

Hockett vs. State, 105 Ind., 250.
Chesapeake Tel. Co. vs. Baltimore Tel. Co., 66 Md., 399.
Central Tel. Co. vs. State, 118 Ind., 194.
St. Louis vs. Bell Tel. Co., 96 Mo., 623, 627.

Statutes fixing telegraph charges have been likewise upheld, though not in terms applicable to any other class of business.

Leavell vs. W. U. Tel. Co., 116 N. C., 211.
State vs. W. U. Tel. Co., 113 N. C., 213.

Statutes regulating tobacco warehouses, though applicable to no other business, have been likewise upheld.

Nash vs. Page, 80 Ky., 539, 545.

Those regulating charges for gas have been upheld, though applicable to no other than gas companies.

State vs. Gas Co., 34 Ohio St., 572.
Zanesville vs. Gas Co., 47 Ohio St., 1.

Statutes regulating water rates, though not regulating the prices of other commodities, have been upheld by this court.

Spring Valley Water Works vs. Schottler, 110 U. S., 347.

Wharfage charges have been the subject of statutory enactments, though the statutes were limited to wharves.

Ouachita Packet Co. vs. Aiken, 121 U. S., 444.

Those regulating ferries and similar establishments have been likewise upheld.

Hudson Co. vs. State, 24 N. J. L., 718.

It was long ago held that the weight of bread may be regulated by statute (Cooley's Constitutional Limitations, p. 744, note 2), yet the weight of other commodities was not so regulated.

A statute prohibiting the transportation of cotton by night within certain counties in Alabama was by the Supreme Court of that State declared to be valid, though applicable to no other class of property.

Mangin vs. State, 76 Ala
Davis vs. State, 68 Ala., 58.

Laws requiring separate schools for white and colored children have been upheld.

Lehew vs. Brummell, 15 S. W., 765.
People vs. Gallagher, 93 N. Y., 438.

Dawson vs. Lee, 83 Ky., 49.
Roberts vs. Boston, 5 Cushing, 198.

Laws requiring barrooms to be kept closed on election days, though permitting all other places of business to be kept open, have been always uniformly upheld.

Laws prohibiting minors from entering barrooms have been likewise upheld, though minors are not prohibited from entering any other place of business, thus discriminating against dealers in liquors.

Counsel for plaintiffs in error relied in the court below, as they doubtless will in this court, on some West Virginia, Illinois and Missouri cases, which seem to deny to the legislature the right to regulate the mining business, and to make reasonable regulations to control the relations of the mining employes and employers. But happily these cases are now brushed aside, and the doctrine has been stated by this court that a legislature may make such regulations as are reasonable for the purpose named.

Holden vs. Hardy, 169 U. S., 366, 380.
Charleston vs. Rodgers, 2 McCord, 496.
Stokes & Gilbert vs. New York, 14 Wendell, 87.
Shaffer vs. Union Mining Co., 55 Md., 74.
Hancock vs. Yaden, 121 Ind., 366.
Jones vs. People, 110 Ill., 590.
Archer vs. James, 2 Best & S., 89.
Daniels vs. Hilgard, 77 Ill., 640.
Litchfield Coal Co. vs. Taylor, 81 Ill., 590.
Commonwealth vs. Bonnell et al., 8 Phila., 534.
Commonwealth vs. Conyngham, 66 Pa. St., 99.
Durant vs. Lexington Coal Mining Co., 97 Mo., 62.

And this may be done by a statute applicable alone to mines.

It will thus be seen that police regulations, like tax statutes, may apply different rules to different persons in different conditions and different classes of property dissimilarly situated, or even to the same kind of property not similarly situated.

The argument of plaintiff in error on this point is based upon a misconception of some of the authorities which they have cited. The decisions to which they call attention are, in the main, based upon entirely dissimilar statutes, and have no relation to the ques-

tion in hand. They cite the case of Dibbrell vs. Morris Heirs, 15 S. W. Rep., 87, 95, but refuse to follow the doctrine which it lays down. In that case the distinguished judge who delivered the opinion said:

"It is believed that an examination of the reported cases will show that none of the legislative classifications of citizens which have been sustained by this court were *arbitrary* in their character. It will also be seen that all of them were made for one or the other of the following purposes, viz: First, for the purpose of taxation; second, for police purposes; third, for the necessary protection of the particular class; fourth, for the release of a class from some particular obligation or liability."

He then proceeded to give examples under each of the classes named, in which legislation in favor of or against a particular class had been recognized as valid, and not only as valid but absolutely necessary. (15 S. W. Rep., 93.) It will be noted that that case suggests that the legislative classifications and discriminations will be sustained unless arbitrary in their character. To the same effect is G., C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150. The right of classification and exemption as to persons and property from the application of the statute was recognized in that case, though a majority of the court determined that the classifications made in that particular statute were arbitrary.

The cases cited by counsel on this point may be fairly classified as follows:

1. Those which prescribe rules for the collection of debts for one class of persons different from those applicable to all other classes, and which rules are in no sense police regulations.

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S., 150.
Frorer vs. People, 141 Ill., 171.
Braceville Coal Co. vs. People, 147 Ill., 66.
State vs. Goodwell, 33 West Va., 179.
State vs. Coal and Coke Co., 33 W. Va., 188.
Wilder vs. Railway Co., 70 Mich., 382.
Railway Company vs. Williams, 49 Ark., 492.
Jolliffee vs. Brown, 14 Wash. St., 155.
Chair Co. vs. Runnels, 77 Mich., 104.
Railway Company vs. Baty, 6 Neb., 37.

2. Those which undertake to prescribe regulations amounting to a partial prohibition of some one particular business, not in itself contrary to public policy and not injurious to society in any sense,

but on the contrary well nigh indispensable. This class of statutes is illustrated by the one prohibiting bakers, but no others, from baking bread on Sunday, as well as the one prohibiting barbers, but no others, from keeping their places of business open on Sunday.

Ragio vs. State, 6 S. W. Rep., 401.
Ex parte Westerfield, 55 Cal., 550.

3. Those which seek to exempt certain individuals or corporations, naming them, from the operations of the ordinary rules of court procedure, or fixing a different rate of interest which they may charge or receive.

Gordon vs. Building Assn., 12 Bush., 110.
Railroad Company vs. Moss, 60 Miss., 641.
Durkee vs. City of Janesville, 28 Wis., 464, 465.

4. Those which are held void because violating of some limitation imposed by a State Constitution.

State vs. Ragio, 6 S. W. Rep.,401.
Comstock vs. Comstock, 24 Mich., 40.
Baggs Case, 43 Pa. St., 512.

5. Those which seek to make the acts of the agents of one corporation criminal, when they do not embrace all other persons in like conditions, and surrounded by like circumstances.

Budd vs. State, 3 Humph., 483.

6. Statutes which seek to give to some particular class of people the right to circulate libelous matter injurious to society.

Park vs. Free Press, 72 Mich., 560.

7. An act which imposed liability on railroad companies for damages without giving them the right of judicial ascertainment.

Railway Company vs. Morris, 65 Ala., 194.

But the distinctions between the cases cited by counsel for plaintiffs in error and in this case have been well pointed out by this court in the case of Holden vs. Hardy, 169 U. S., 366, 380. As a result of all of these cases, we respectfully submit that it is well settled that a statute is not void because not applicable to all persons and all property, but that it is valid provided it applies to all persons or all property similarly situated. Unless it can be shown,

therefore, that the persons and property exempted from the operation of these laws are "under like circumstances and conditions" with those brought within their operation, the contention of plaintiffs in error cannot be maintained. It is immaterial whether the statute in specific terms applies only to certain persons or certain classes of property, or whether it is broad enough to include all persons and all classes of property and is made inapplicable to those that are exempted from its operation by an exception or proviso.

An analysis of the statutes under discussion will clearly demonstrate that they fairly include, and were intended to include, all dealers, miners and manufacturers who control the output of the factories and mines and the prices of the products that are sold to consumers. The statute may, therefore, fairly be construed as applicable to this class of cases, the exceptions excluding from the operation of the statutes the products while in the hands of those who produce them, and live stock while in the hands of those who raise it, simply eliminates all except the dealers in those commodities, the miners and manufacturers. It is not believed that anyone would question the right of the Texas Legislature to make a statute applicable only to manufacturers, miners and dealers in the prime necessities of life. But suppose such a statute had been passed. Products while in the hands of the farmer or planter, and live stock in the hands of the raiser, would be exempt from its operation. What difference can it make that the statute in broad and explicit terms included all persons and all property within its purview, and then by a proviso or exception eliminates the character of property and the character of persons to whom it is not designed to apply? The effect or result of the statute must be noted, rather than the particular phraseology in which the effect or result may be produced. It is well settled that before a statute can be declared void because not applicable to all persons or all property it must be shown that the classifications or discriminations under the statute are arbitrary or capricious. In other words, it must be shown that no sufficient reason for the classification exists. To illustrate: The statutes regulating freight and passenger rates on railroads, whether by a direct exercise of the legislative power or through a railroad commission, are inapplicable to any other carriers than railroads. For example, the statutes of Illinois, Minnesota, Iowa, Texas and Georgia, which seek to give the Railroad Commissions

the power to fix freight and passenger rates on railroads, do not clothe the commissions with the power to fix freight and passenger rates on public carriages, hacks, and stage coaches, nor for wagoners who may be common carriers. Yet hackmen, carriage owners, stage owners and wagoners are as much common carriers as railroad companies are. But it has never occurred to anyone to challenge the validity of these laws for that reason, because it seemed to be admitted that the conditions and circumstances surrounding the railroad transportation, and the reasons for its regulation were so dissimilar from those surrounding other common carriers as to render the regulations applicable to one wholly unnecessary and inapplicable to the other. While the statutes in question exempt agricultural products and live stock in the hands of the producer, or raiser from their operation, the question is, is there any reason why they should have been made applicable to those commodities while in the hands of the raiser or producer? Are the conditions surrounding the agricultural products and live stock while in the hands of those who produce the one or raise the other such as to require the same regulations as are necessary to be had after these commodities shall have passed into the hands of dealers? Suppose it should be found by the Legislature, in the exercise of a proper and wise discretion, that the raisers of live stock and the producers of farm products are unable to form any combinations or agreements in restraint of trade which would be able to control prices or destroy or affect competition. Is there any reason why the Legislature should be called upon to pass a law prohibiting that which cannot be done in order that they might prohibit that class of agreements which can be made effective, and which are harmful to society? Upon the plaintiff's in error in this case rests the burden of proving that the conditions surrounding these classes of property while in the hands of the raiser or producer are such as to require substantially the same regulations for the protection of society that become necessary when it passes into the hands of the dealers. Unless that can be shown they have no right to challenge the constitutionality of these statutes because they are in no position so to do. It is an elementary principle that every statute must be held valid until the contrary is made to appear beyond a reasonable doubt.

Hennington vs. Georgia, 163 U. S., 304.
Powell vs. Pennsylvania, 127 U. S., 684.

State vs. Laughlin, 75 Mo., 147.

State vs. Addington, 77 Mo., 110, 118.

In as much as counsel for plaintiff's in error insist that these statutes are void because of the exceptions, they must prove to this court from the record or from facts within the judicial knowledge of this court, beyond a reasonable doubt, that the classifications in the statutes are erroneous and that the property excluded from their operation should have been included within them. If they do less than this they cannot show to this court that the exceptions were arbitrarily made, and that no reason for their existence can be found. This court has held that if there is one construction or one hypothesis which is reasonable that would uphold a statute, then that construction or that hypothesis should be adopted, even though another be more natural or probable.

U. S. vs. Central Pacific Ry. Co., 118 U. S., 235, 240.

Broughton vs. Pensacola, 93 U. S., 266.

Red Rock vs. Henry, 106 U. S., 599.

Hobbs vs. McLean, 117 U. S., 567.

U. S. vs. Coombes, 12 Pet., 72.

Ogden vs. Saunders, 12 Wheat., 270.

Grenada Co. vs. Brogden, 112 U. S., 261.

23 Amer. & Eng. Ency. of Law, Subd. 2, p. 349, and authorities there cited.

Plaintiffs in error have not discharged the burden which devolved upon them of showing that the discriminations in these statutes are arbitrary.

They have not shown that the same regulations are necessary in dealing with this property while in the hands of the raiser or producer as may be after it passes into the hands of the dealers. They have, therefore, failed to show that the statutes are unconstitutional. They cannot be heard to say that by showing a discrimination or a classification that they have shifted the burden of proof on the defendant in error. The burden never shifts from him who attacks the constitutionality of the statute. It has never been held that a statute which discriminates in favor of or against a class of citizens or property, or fixes different rules for different classes of persons or property under different conditions, is invalid. When a person shows that a statute discriminates, he has proven only half of his case. He must follow it up by showing that the discrimination

is arbitrary and unreasonable. But in this case plaintiffs in error have contented themselves with showing that there is a discrimination, and have left this court to presume that it is arbitrary.

Courts will not indulge in any presumptions against the validity of this statute. A distinguished text-writer has said: "The legislature and judiciary are co-ordinate departments of the government; * * * and it is only when the courts find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action." Cooley's Const. Lim., Secs. 192-3. To find that the legislature has not kept within its constitutional limits in this case, this court must find that the statute discriminates, and that it discriminates without reason, and that must appear beyond a reasonable doubt.

A court will not declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizens, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution.

Cooley's Const. Lim.,6 Ed., p. 197.
Wellington, Petitioner, 16 Pick., 87-96.

If the rule were otherwise, the government would be such as arbitrary discretion of its judges might suggest, and would differ as often as courts differ. In the language of this court:

"There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard. But it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature. * * * This court can know nothing of public policy except from the Constitution and laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." (License Tax Cases, 5 Wall., 469.)

All mere questions of expediency and all questions in respect to the just operation of the law within the limits prescribed by the Constitution were settled by the legislature.

Perry vs. Keene, 56 N. H., 530.
People vs. Fisher, 24 Wend., 215-20.
State vs. Staten, 6 Cold., 238.
Walker vs. Cincinnati, 21 O. St., 14.
State vs. Smith, 44 O. St., 348.

The cases last above cited show that courts cannot set aside an act under the impression that they have discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is held that nothing but express constitutional limitations can control the action of the legislature.

Cooley's Const. Lim., 6 Ed., 204-5.
Cochran vs. Van Surlay, 20 Wend., 365, 381-3.
This express conflict must be capable of being pointed out.
People vs. New York Central R. R. Co., 34 Barb., 123.
Gentry vs. Griffith, 27 Texas, 461.

Has the conflict in this case been pointed out? The fact that the Texas legislature can pass no valid law in conflict with the Fourteenth Amendment to the Federal Constitution is admitted. But does this law conflict with the Fourteenth Amendment? The burden being upon the plaintiffs in error to point out the conflict, has that burden been discharged? If so, how? Have not counsel contented themselves with showing that the statutes do not apply to all persons and all property? In other words, that they discriminate or exempt property from their operation under certain conditions. Is there anything new in that? Do not police regulations which are applicable alone to railroad companies exempt all other property from their operation? Do not the statutes and ordinances regulating the laundry business exempt all other kinds of business from their operation? Are not the regulations of the liquor traffic applicable alone to that class of business? Are not the statutes prohibiting the playing of cards in public places and exempting other games from their operation in the same sense discriminative? Are not the laws which compel liquor dealers to close their houses on election days and permit other merchants to keep theirs open discriminative? Are not the probate laws of the various States which allow certain classes of claims to be preferred over others discriminative? Indeed, is not the greater part of the legislation of all the States discriminative in the sense that it applies to special objects only to the exclusion of others? It cannot in fairness be stated that these statutes under discussion are void simply because they are not applicable to all classes of persons and property, without reference to the circumstances and conditions surrounding those excepted from their operation. If they be void for that reason, then all the legislation above mentioned is likewise void. Counsel for ap-

pellant must go further than to say that there are discriminations. They must show that they are unjust or unreasonable discriminations—that they are arbitrary.

It has been heretofore stated that the burden is on the plaintiffs in error to show that the conditions that surround these classes of property while in the hands of the producer or raiser are such as to require for the protection of society the same police regulations that become necessary after the property passes into the hands of the dealer. They have not discharged this burden which they voluntarily assumed. They seem to insist that the burden is upon the State to show that this classification is fair, and that there is some reason to support it. The burden is not on the State, but it might safely be assumed in this case; and in so doing it would not be necessary to ask the court to announce any new doctrine or to take any position inconsistent with the well settled rules of construction. The first thing to ascertain in the construction of the statute is, what evil did the Legislature seek to prevent? What evils were there in existence which needed to be remedied? The Supreme Court of Texas in a well considered opinion have undertaken to answer this question. The laws in question are denominated anti-trust laws. That court in discussing the Act of 1889, said:

"Its title is 'An Act to prevent trusts, and to provide for penalties and punishments of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas.'"

The title of the Act of 1895 is almost identical with that of the one above quoted. (Record, p. 24.) What the Supreme Court of Texas has said, then, in reference to the Act of 1889 may well be applied to the Act of 1895. Discussing the Act of 1889, it said:

"The term 'trust' is not here employed in a technical sense. By very recent commercial usage this meaning of the word has been so extended as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public. The formation of gigantic combinations for these purposes in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without parallel. See 2 Beach on Priv. Corp., Sec. 856, and notes. In the year 1888 the discussion seems to have become general, and in 1889 many Legislatures, including our own, made laws for the purpose of punishing and repressing such conspiracies. 2 Beach on Priv. Corp., 1351, note 2.

"Notable instances of these combinations were that of manufacturing corporations engaged in refining sugar, which was declared illegal by the Court of Appeals of New York in the case of the People vs. North River Sugar Refining Company, 121 New York, 581; that of the 'Cotton Seed Oil Trust' (The

State vs. Cotton Seed Oil Trust, 40 Louisiana Annual, 8); that of the 'Diamond Match Trust' (Richardson vs. Buhl, 6 Law Reporter Annual, 457); that of the 'Chicago Gas Trust' (The People vs. Chicago Gas Trust, 130 Illinois, 268); that of the 'Standard Oil Trust' (Rice vs. Rockefeller, 8 Railway & Corporation Law Journal, 886); and that of the 'Alcohol Trust' (The State vs. Nebraska Distilling Company, 8 Railway & Corporation Law Journal, 323). For other cases of like character, see Morris Run Coal Company vs. Barclay Coal Company, 68 Pa. St., 173; Arnpt vs. Coal Co., 68 N. Y., 558; Santa Clara V. M. & L. Co. vs. Hays, 76 Cal., 387; Clancy vs. Onondega Salt Co., 62 Barb., 395; Craft vs. McConnoughy, 79 Ill., 346; India Bagging Co. vs. Kock, 14 La. Annl., 168; Gibbs vs. Baltimore Gas Co., 130 U. S., 396; Texas Oil Co. vs. Adoue, 83 Texas, 650; and Anderson vs. Jett, 89 Ky., 375.

"*The instances of combinations shown by the cases cited serve to illustrate the causes of popular discontent, and the evils which the Legislatures of the several States sought to remedy by direct statutory enactments upon the subject.* They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce or the rates of transportation and intercommunication. The evils resulting from these operations were doubtless paramount in the minds of the legislators when they passed the statute under consideration; *and it was to repress these practices that the law was enacted.* By 'the plain import of its language' it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles." (Ins. Co. vs. State, 86 Texas, 250, 266.

Are not the reasons above stated conclusive on this court? Is not the construction of the Supreme Court of Texas conclusive on the question of this *intention* of the Legislature?

The Supreme Court of the State have determined that the purpose of the Legislature in passing the act—the legislative intent, if you please—was to prevent combinations of capitalists and corporations from controlling the price of products of prime necessity, and to prevent the formation of gigantic combinations for this purpose. The Legislature had in its mind but this one point, and that was to prevent combinations of capital for the purposes stated—that is, the control of prices and the destruction of competition. It is reasonable to suppose that the Legislature would not want to do more than to accomplish that purpose. The Supreme Court of Texas in the opinion stated, has said that in 1888 the discussion seemed to have become general, and in 1889 many legislatures, including that of Texas, made laws for the purpose of punishing and suppressing such conspiracies. That learned court cited authorities to show the extent of this discussion, not on the hustings but in the courts of last resort in almost every State in the Union, and in this

high court as well. To these might have been well added the investigations made by the various legislatures and by Congress. These cases thus cited may be examined in vain to find a single instance where the raisers of live stock or the producers of agricultural products were charged with having made any combinations for either of the purposes stated—the controlling of prices or the destruction of competition. If they had ever attempted such a combination the attempt was so weak as to have excited no comment There was, therefore, no reason why the Legislature should undertake to prevent combinations of a class of people who had never up to that time been able to control the prices of a single commodity raised or produced by them, when there was no probability that they would ever be able so to do. As before stated, the Legislature sought to deal with manufacturers, miners and dealers in the prime necessities of life. It sought to prevent the combinations of manufacturers, miners and dealers which would affect the prices of the various articles necessary to human existence. In order to accomplish that purpose counsel for the plaintiffs in error insist that all combinations between the raisers of live stock or the growers of farm products should have been likewise prohibited, though combinations between those classes last named would not be hurtful to society. In other words, they announce the proposition that in order to prevent that which is hurtful, acts which are innocent must also be prohibited. In order to prohibit combinations that will be injurious to society, the Legislature must prohibit those combinations which are not injurious to society. On the same principle the laws regulating railroad freight and passenger rates must be held invalid for the reason that they do not undertake to regulate the charges made by other common carriers. Yet, as before pointed out, no railroad legislation has heretofore attempted to regulate other carriers, unless it be express companies. Why? Because the injuries inflicted by those carriers other than railroads were so slight as not to be appreciable, and, therefore, no reason could be found why they should be regulated in order to make valid regulations as to railroads. So it is here insisted that a statute which seeks to deal with manufacturers, miners and dealers in commodi-

ties need not include within its terms producers or raisers because the harm that is done by the producer or raiser of live stock, if harmful at all, is so trivial and unimportant to society at large that it is not necessary to include them within the terms of the statute. That was the view of the Court of Civil Appeals of Texas, whose decision this court is asked to review. That learned court said:

"Whatever conditions may exist elsewhere concerning the conduct of the producing class in effecting through combinations the price of their products, it cannot be said to exist in this State, if at all, to any appreciable extent; at least not to such an extent as to be an evil of such proportions as to necessarily require corrective measures for its suppression. All these facts were known to the Legislature, and evidently influenced them in selecting the subjects to which the law should be applied. (Plessy vs. Ferguson, 163 U. S., 550). And, as said in Railway Company vs. Macay, supra, it was simply a matter of legislative discretion whether the same liabilities should be applied to the classes which were exempted from the operation of the statute. * * * The conditions of the classes embraced in the act and those excluded are not altogether similar, and there are many distinguishing features between the two which suggest a power in the one to successfully combine, and which deny it to the other." (Record, pp. 175-6.)

We understand it to be well settled that the finding of the State court on a question of fact is conclusive on this court. (Egan vs. Hart, 165 U. S., 188, and authorities there cited.) It must follow that the findings of the Court of Civil Appeals that the conditions existing in Texas were such that the farmers and stock raisers of Texas had never been able to injuriously affect the price of commodities nor competition, and that therefore there was no necessity of any legislative correction of them is conclusive on this court. If this view obtains it will dispose of this question. Certainly this view ought to obtain unless the members of this court can say that they judicially know that the findings of fact made by the Court of Civil Appeals upon this question are erroneous.

We submit that the decision of the Supreme Court of Texas in which they state the evils sought to be remedied by this legislation, and the statements of the Court of Civil Appeals as to the reasons for the exemption, are not unsupported by the decision of this court in the case of the United States vs. Trans-Missouri Freight Association (164 U. S., 389). There is nothing in the record of this case to indicate that the findings of the Court of Civil Appeals on the facts are wrong. Besides, this court must take judicial cognizance of the fact that there has never been in the Union any complaint that the farmers and stockraisers had ever succeeded in controlling, or that they were likely to be able to control the prices of

the prime necessities of life. In the sugar trust case it was not hinted that the producers of sugar had been able to fix the price, but it was the refiners of sugar. In the Standard Oil case it was not the producers of the raw petroleum, but it was the refiners that had gotten control of the market through large combinations of capital. The recent combinations in the price of grain were not made by the farmers of the great northwest, but by the dealers in Chicago. Indeed, the dealers in the prime necessites of life have always controlled the markets, the producers having had practically no voice in it. Take any commodity—cotton for example; the dealers control the price. Take wheat; the dealer controls the price, and has been able to raise or lower it at his pleasure—the producers are powerless. Take meat; the raisers of the live stock cannot control their prices, but it is the packing houses that control the price of the product after the live stock is slaughtered. With these well known facts, why should it be said that the Texas Legislature—not only the Texas Legislature but the Legislatures of all other States—must prohibit the harmless agreements between stock raisers and between farmers in order to be able to prohibit the injurious agreements thus hurtful to society made by dealers, manufacturers and miners? It is well konwn that the consumers do not purchase the commodities necessary to their existence directly from the producers. The farmers and stock raisers sell their products and their live stock to dealers, and the dealers sell to the consumers. If the market gardeners around Chicago should undertake to control the prices of a given product, with the railroad and express facilities which we now have the market gardeners of the entire United States would become thier competitors, and unless the combinations were made between market gardeners everywhere, those immediately adjacent to any particular city could not control the market in that city. Strawberries are sent from Texas to St. Louis. Fruit and berries are sent from San Francisco to Chicago. Vegetables are sent from Mississippi and Michigan to every part of the United States by market gardeners, and unless the combination becomes complete between all of them throughout the Union, which is improbable—if possible—they cannot control the price of a single product. It may still be asked, if they are powerless to control, why did not the Legislature include them within the terms of the statute? The answer to that is that the

question is immaterial. It is a matter purely within the legislative discretion, and the only question pertinent to the issue is whether the law bears equally upon all persons and property similarly situated, and if it be shown that the producers and raisers are not similarly situated in respect to these particular statutes, the only question is whether the Legislature had a right to do what they did, and not as to why they did it. The Legislature within its constitutional limitations is like the individual within his. Any citizen may perform an act the wisdom of which is not apparent, or the necessity for which is not recognized. But if he has a right under the law to perform that act, neither courts nor citizens have any right to institute any inquiry in respect thereto. So it is with the Legislature. The Legislature acting within its constitutional authority has a right to pass any law it pleases, so long as that law does not take from any citizen a right guaranteed to him by either the State or Federal Constitution; and those whose duty it is to enforce the laws passed by the Legislature are not compelled to give any reason why the Legislature passed it, but those who attack the work of a legislature, must show that the legislature did not have the power to pass the law of which complaint is made.

Adverting again to the decision of the Texas courts, I beg to suggest, with all due deference to this court, that great weight should be given to a decision of a State court on questions of this character—greater, indeed, than on any other question. The members of this court are wisely taken from all parts of the Union. I presume that I am not putting it too strongly when I say that it is impossible for any one member of this court to be familar with all of the local conditions in every state in the Union. They are presumed to know many things that it is impossible for any one man to learn. I heard a learned judge on one occasion say, during the progress of an argument, that he was presumed to know the geography of every foot of this country, but that he was utterly ignorant of the geography of the particular territory then in question. I apprehend the members of this court are somewhat similarly situated. The members of the Texas bar engaged in this case would not be, I take it, sufficiently familiar with local conditions in New York, Chicago and San Francisco as to be able to determine what police regulations were necessary in those several cities. It is true that some of them might be so absurd that on their face we would

say they were unjust, capricious, and adopted without reason. Others we would at once determine were wise and salutary, or at least within legislative discretion. But there must be many regulations the wisdom of which depends upon the particular conditions in those cities to which they are sought to be applied, and our want of knowledge of those conditions might render it impossible for us to tell whether they are wise or unwise. But if the courts of those States, familiar with the conditions upon which they are called to pass, the existence of which would determine whether the Legislature had the power to pass the particular regulations or not, were to hold after repeated arguments from those who are interested that the conditions existed which justified the regulations, I apprehend that counsel in this case would undoubtedly say that the courts were the best judges of the local conditions there, and that the legislature had the power to pass the laws in question. So I apprehend that it must be with this court in dealing with the legislation of the various States. Many of the laws of which complaints are made are palpably wrong, possibly in plain violation of the Federal Constitution. Others are clearly right and necessary. Then there must be a large class of laws brought here for review, the validity of which, like the ones in question, must depend upon the conditions in the particular localities in which they are to be applied. If there is anything in the record in the particular case to indicate that the conditions did not justify the laws, then this court can set them aside. If this court judicially knows that there were no facts or conditions upon which the classification could be justly based they should be set aside. If there is nothing in the record, and nothing judicially known to the court, to prove that they are unreasonable or capricious, then I apprehend that if the courts of that State upheld them that this court will not declare them invalid.

The Courts of Civil Appeals have upheld these classifications in this case, based on the reasons above indicated—that the difference in the conditions and circumstances surrounding the property while in the hands of the producers or raisers and those surrounding it while in the hands of dealers, justifies the discriminations or classifications made. The Supreme Court of the State, doubtless for a similar reason, refused a writ of error in this case, and overruled a motion for a rehearing. (R., pp. 207, 211.)

Insurance Co. vs. State, 86 Texas, 250.

Houk & Dieter vs. Brewing Association, 88 Texas, 184, 189.
Coal Company vs. Lawson, 34 S. W. Rep., 919.
Brewing Company vs. Templeman, 38 S. W. Rep., 27.
Fuqua vs. Pabst Brewing Co., 38 S. W. Rep., 30.
Gates vs. Hooper, 90 Texas, 563.

In this connection it is proper to add that the statement in the brief of plaintiff in error to the effect that the Supreme Court had recognized this classification as just in cases decided before the decision by this court of the case of G. C. & S. Ry. Co. vs. Ellis, (165 U. S.) is inaccurate, if counsel mean to be understood as saying that the Supreme Court have not decided that point since the decision of the Ellis case. The record of this case shows that the writ of error was refused on the 5th day of May, 1898, and the motion for rehearing therein overruled on the 26th day of May, 1898, which shows the error involved in that statement.

What has been said in reference to agreements between farmers and stockraisers is likewise true of laborers who seek to maintain a given standard of wages. We have never heard of agreements between laborers to insist on a given standard of wages having been held or believed to be contrary to public policy. In this connection it is necessary to discriminate between agreements to maintain a living standard of wages, and in the unlawful means sometimes adopted to enforce such agreements. The agreement and the means used to enforce it must be kept distinct. The agreement may be lawful, and yet unlawful means adopted to enforce it. I have never heard anyone complain that laborers did not have the inherent right to agree that they would not work unless they could obtain a given standard of wages; but the complaint arises when they undertake to COMPEL others to accept their agreements—when they attempt to prevent others from working for lower wages. Railroad laborers may strike, others may strike, because they think their wages inadequate. I understand it to be conceded that they have a right to do this. They have a right to agree—at least it does not injure society for them to agree—that they will not work unless they are paid a reasonable amount. But if some other laborers undertake to work and those who have made this agreement seek by force or threats to prevent their doing so, it is that that is condemned—the forcible interference with the rights of others, not the agreements. Why? Because if laborers may quit any work in which they are en-

gaged, their places can be filled in a few days; and if when new labor comes in they abstain from violence, the machinery moves on as before. It is the violence that is to be condemned, not the agreement. It is the violence that is injurious to the public, not the mere act of agreeing to quit work. It is perfectly lawful for one man to agree to give his neighbor possession of a house or farm on a given date. But if his neighbor undertakes to enforce that agreement by unlawful means, the means of enforcing it are condemned, but the agreement itself is upheld. An agreement to pay money to a creditor on a given date is a lawful agreement, but if that creditor undertakes by unlawful means to compel the payment of that money on that date, or any date subsequent thereto, his agreement to require the payment is lawful, but the means to which he resorts to enforce it are condemned.

Thus distinguishing between the agreement itself and the means used to enforce it, the statute of 1895 is valid, and everything said in reference to the statute of 1889 is applicable to it.

But the Act of 1895 becomes immaterial in this connection; because if it be invalid for the reason that it permits contracts to be made by laborers to maintain a standard of wages, and for that reason only, it leaves the Act of 1889 in full force and effect. The Act of 1889 is not expressly repealed—it is repealed only in so far as it conflicts with the Act of 1895. If the Act of 1895 is void, there is nothing with which the Act of 1889 conflicts—in other words, a void act repeals nothing.

We have thus discussed the question of the reasonableness of these discriminations. We have endeavored to present our views of the case by insisting on the following propositions:

1. That the burden of proof is upon the plaintiffs in error to show beyond a reasonable doubt that these statutes are invalid because the discriminations or classifications of which complaint is made were arbitrary and capricious.

2. That that burden had not been discharged by them, because there is no fact in the record, nor nothing judicially known to this court, which would justify the contention made by plaintiffs in error.

3. That the statutes substantially apply to dealers, manufacturers and miners, and exclude from their operation only the raisers of live stock and the producers of agricultural products, in so far as they deal with those commodities raised by them. But that when

they deal in commodities other than those they have raised they become dealers, and the law applies to them, and therefore applies to all persons similarly situated.

4. That there is no necessity for the prohibition of agreements between the raisers of live stock and the growers of agricultural products, for the reason that they are powerless to control the prices of their products, if they so desired, and in as much as they are powerless to do any injury these statutes cannot be invalid, because the Legislature did not likewise seek to prevent contracts that were harmless to society.

5. That no complaints have ever been made in the many legislative, congessional and judicial investigations that farmers and stock raisers have sought to control the prices of their products, and that, therefore, it should be conclusively presumed by this court that no effective combinations of that kind had been made, or complaint of their existence would have been heard.

6. That the fact that the Act of 1895 does not prohibit contracts between laborers to maintain a standard of wages does not render that act void, because such acts are not contrary to public policy, and have never hurt society—distinguishing in this connection contracts between laborers and the unlawful means sometimes used to enforce them.

7. That the decision as to the validity of the Act of 1895 is immaterial in this case, because if it be held invalid on account of the additional exception above mentioned, still the Act of 1889 will remain, and will prohibit the class of agreements which were shown to have been made in this case.

We have laid great stress on the decisions of the Texas courts as to the reasonableness of these discriminations, but we do not wish to be understood that this court should abdicate its high position, or relinquish its prerogative of determining the questions involved in this case out of deference to the Texas courts, except on the ground stated that this court is concluded by the findings of fact made by that court. But if this court does not accept that view then we insist that the decision of these State courts, the correctness of which must depend upon local conditions, should be given greater weight by this court; that this court ought to defer to those courts on questions of this kind rather than on the decision of questions which do not depend upon an accurate knowledge of local condi-

tions. And in this connection we beg to suggest that the decisions of the Texas courts have not been capricious in any sense. They have followed, and are now following, the settled policy of that State in holding the discriminations reasonable. It cannot be suggested by even the most malevolent that the Texas courts have undertaken to heed the impulses of the mob. Because the history of that State will acquit them of any such suggestion. In order to make that clear we beg again to recur to the distinction between police regulations and taxing laws. They are very close akin. It is difficult to determine whether an occupation tax is a police regulation or whether it is a revenue measure. It is believed that the distinction depends upon the purpose of the Legislature in passing the occupation tax law. If its purpose was to raise a revenue it is a revenue measure. If its purpose was to regulate the business, with revenue as a mere incident, it is a police regulation. (Cooley on Taxation, 1st Ed., Chap. 19, pp. 396-7.) But in any event the taxing power and the police power of a State must be exercised alike in conformity with the Fourteenth Amendment to the Federal Constitution. Arbitrary discriminations must not be made in either instance; but the taxing power and police power may be varied to suit the different subjects to which they are sought to be applied. Taxes must be equal and uniform upon all classes of property similarly situated.

Police regulations must be applicable to all persons and property similarly situated. They need not apply to all property dissimilarly situated. For instance, railroad regulations may not apply to any other kind of property. Statutes and ordinances regulating laundries need not regulate the drug business. The same may be said of tax laws. Tax laws that are just to railroad companies, telegraph companies and express companies may be unjust to the holders of other property. Hence different rules may be applied to these different classes of property. Bearing in mind that revenue laws and police regulations must be reasonable and not capricious in their discriminations, it will be interesting to note some of the revenue laws of Texas which have existed ever since that State became a part of the American Union.

It was admitted into the Union under what is known as the Constitution of 1845, which contains, among others, the following provision: Art. VII, Sec. 27:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax, and to tax all persons pursuing any occupation, trade or profession; *provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, p. 211.)

In 1861 Texas undertook to secede. The convention declaring for secession amended the Constitution of 1845 so as to conform to the new conditions, but Art. VII, Sec. 27, was preserved and made to read as follows:

"Section 27. Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; *provided, that the term occupation shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, p. 247.)

In 1866 another Constitution was formed under what is known as President Johnson's policy. Article VII, Sec. 27, of that instrument reads as follows:

"Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession; *provided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, page 322.)

In 1869, what is known as the Reconstruction Constitution of Texas, was adopted. Section 19, Art. XII, of that instrument reads as follows:

"Taxation shall be equal and uniform throughout the State. All

property in the State shall be taxed in proportion to its value to be ascertained as directed by law, except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax and to tax all persons pursuing any occupation, trade or profession *provided, that the term 'occupation' shall not be construed to apply to pursuits either agricultural or mechanical.*" (Sayles' Texas Statutes, Vol. 4, p. 461.)

When the democratic party regained power in Texas, it made a new Constitution, which was adopted in 1876, and is known as the Constitution of 1876. Section 1, Article VIII, of that instrument so far as applicable, reads as follows:

"Taxation shall be equal and uniform All property in this State whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, *except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax;* provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State, shall be exempt from taxation." (Sayles' Texas Statutes, Vol. 4, bottom of page 557 and top of page 558.)

It will thus be seen that no matter which party framed the State Constitution, whether the revolutionists who won Texas' independence, the democratic party, the secessionists in 1861, the republicans in 1869, or the democrats in 1876, in each Constitution it was declared without reference to party distinctions that all natural persons and corporations other than municipal corporations, *except persons engaged in agricultural and mechanical pursuits,* should be subject to an occupation tax. Texas had some reason in so doing—it was not a capricious discrimination in favor of agriculturists and mechanics, but the conditions were such as to justify it. I

seems that this must conclusively appear, because if this was an improper classification, surely the democrats, republicans, secessionists and all other classes would not have in each Constitution made the same discrimination. The occupation tax laws of Texas have been uniformly held valid. It has not even occurred to anyone to question their validity on account of these discriminations.

Giozza vs. Tiernan, 148 U. S., 660.
Higgins vs. Rinker, 47 Texas, 383, 395.
Harris vs. State, 4 Tex. App., 131.
Tonella vs. State, 4 Tex. App., 325.
Languille vs. State, 4 Tex. App., 312.
Ex Parte Cooper, 3 Tex. App., 489.
Ex Parte Mabry, 5 Tex. App., 93.
Albrecht vs. State, 8 Tex. App., 216.

In the last mentioned case the opinion of the court was delivered by Judge Clark. That portion of his opinion bearing upon this subject reads as follows:

"The class of subjects proposed to be taxed were retail dealers in spirituous, vinous or malt liquors, and the provisions of the law are made to apply to all such dealers within the limits of the authority levying the tax. That more money may be collected from one dealer than another does not destroy the equality or uniformity of the system, within the meaning of the Constitution, but the tendency and effect is decidedly to the contrary. 'Perfect equality and uniform taxation will remain an unattainable good as long as laws and government and man are imperfect.' Approximation to this is all that can be had, and this is remitted to the patriotic judgment of the law making power. Whether a tax is just and equal or not, is not a question of law. If it were, courts, by adopting a standard of rigid construction, might altogether put a stop to taxation; for no system ever devised, whether it related to a tax on property or on business, or a capitation tax, ever in its practical operations bore equally and uniformly on the same class of subjects. If there is such equality and uniformity as conforms to the standard provided in the Constitution, or reasonably deducible from it, it is all that can be required. Texas Banking and Insurance Company v. State, 42 Texas, 639; Youngblood v. Sexton, 32 Mich., 414; Cooley on Taxation, 124-127. Viewed in its twofold aspect, the law in question is free from objection on this account." Albrecht v. State, 8 App., 228.

Paraphrasing this opinion quoted, it can be made to read as follows: Perfect equality and uniformity in police regulations will remain unattainable as long as laws and men and government are imperfect. Approximation to these is all that can be had, and this is remitted to the patriotic judgment of the law making power. Whether a police regulation is just and equitable or not is not a question of law. If it were courts by adopting a standard of rigid

construction might altogether put a stop to police regulations, for no system ever devised, whether it related to the regulation of property or of business or of persons, ever in its practical operation operated equally and uniformally on the same class of its subjects. But such equality and uniformity as conforms to the standard provided in the Constitution and reasonably deducible from it is all that can be required.

It ought, therefore, to be held that absolute equality in police regulations is impossible. No police regulation can be made absolutely fair and just if it applies to more than one class of property. Humanity is imperfect. Its work[illegible] must be imperfect. No finite mind can grasp all of the conditions and analyze all of the circumstances and in all instances reach a correct conclusion as to what is wisest or best to be prohibited or permitted. Approximation to the right is all that can be had, and, as declared by the Court of Criminal Appeals of Texas, the question at last is remitted to the patriotic judgment of the law making power. Courts ought not to adopt a standard of rigid construction which would practically put a stop to police regulations, but let humanity, in its efforts to control the offending elements of society, and the combinations of capital that are a menace to liberty, solve these problems as best they can, without having erected by courts artificial barriers which render more difficult the struggle which at best is hard enough.

Do the acts in question deprive any citizens of their property without due process of law, in that they deny to some citizens the liberty of contract which they permit to others?

If the contracts sought to be prohibited by the statutes in question are hurtful to society, the right of the government to prohibit them cannot be questioned.

Stone vs. Mississippi, 101 U. S., 814.
Beer Co. vs. Massachusetts, 97 U. S., 25.
Thorpe vs. Rutland, 27 Vt., 149.
State vs. Wheeler, 25 Conn., 290.
Mayor vs. Miln, 11 Peters (U. S.), 139.
Cochran vs. Van Serlay, 20 Wend., 380.
Dorman vs. State, 34 Ala., 232.
Boston vs. Cummins, 16 Ga., 112.
Hamilton vs. St. Louis Co., 15 Mo., 23.
Wynehamer vs. People, 13 N. Y., 390.

Town of Guilford vs. Supervisors, 13 N. Y., 143.
Dibbrell vs. Morris Heirs, 15 S. W., 87, 90.
Sharpless vs. Mayor, 21 Pa. St., 147.
Bertholf vs. O'Reilly, 74 N. Y., 514.
Teidman's Lim. Pol. Powers, p. 5.
Cooley's Elements of Torts, p. 99.

The right of a citizen to make what contracts he pleases has been discussed many times by courts and text-writers. Mr. Cooley states the rule as follows:

"Every person sui juris has a right to make use of his liberty in any lawful employment in his own behalf, or to hire it out for the service of others. The State must always be at liberty to determine what are lawful employments, and to make others unlawful by prohibiting them. The authority to regulate business embraces every class and variety of occupation, and may be exercised either in respect to the persons who may be employed in the business, or as to the methods in which the business may be conducted." (Cooley's Elements of Torts, p. 99).

This language was used with reference to the powers of a Legislature. Mr. Teidman, in his excellent work on limitation of police powers, uses the following language:

"Where can these limitations be found (that is the limitation upon the exercise of police power), and in what do they consist? The Legislature is clearly the department of the government which can and does exercise the police power, and consequently in the limitations upon the legislative power, are to be found the limitations of the police power. . . . . Whenever an act of a Legislature contravenes a constitutional provision it is void, and it is the duty of the courts so to declare it, and refuse to enforce it. But is it in the power of the judiciary to declare an act of the Legislature void, because it violates some abstract rule of justice, when there is no constitutional prohibition? Several eminent judges have more or less strongly insisted upon the doctrine that the authority of the Legislature is absolute in those cases in which the Constitution fails to impose a restriction." Teidman's Lim. Pol. Powers, p. 5.

Continuing he said:

"But notwithstanding the opinions of these eminently respectable judges, the current of authority, as well as substantial constitutional reasoning, is decidedly opposed to the doctrine. It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limit of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice." Tiedman's Lim. Pol. Powers, page 7.

And of the right to enquire into the wisdom of these restraints and prohibitions the Court of Appeals of New York uses the following language:

"The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional

restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the Constitution, the question of its validity is at an end, and neither the executive or judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities." 74 New York, 514.

Again: "Admitting, as we do, the soundness of this view, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the Constitution." (Berthoff v. O'Rielly, 74 N. Y., 516.)

Particular attention is asked, also, to the able opinion of Judge Jeremiah S. Black found in the case of Sharpless vs. Mayor, 21 Pa. St., 147.

It will thus be seen that the liberty to contract is limited to lawful subjects. The Legislature has a right to prohibit any contract which it deems to be contrary to sound public policy, provided the exercise of the power of prohibition, in the language of the Supreme Court of Illinois. "be not unreasonable." Dealing in futures has been prohibited. Lotteries have been prohibited and the prohibitions sustained. Gambling contracts of all kinds are held void, because prohibited by law. Contracts in restraint of trade, the tendency of which is to destroy competition, Texas has a right to prohibit, because such contracts are injurious to society. They cannot be defended. The reasons for the existence of such laws have been most forcibly and clearly stated by this court speaking through Mr. Justice Peckham in the case of the United States vs. Trans-Missouri Freight Association, supra. His language will bear repetition here:

"Mere reduction in the price of the commodity dealt in might be early paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital. In any great or extended change in the manner or method of doing business it seems to be an inevitable necessity that distress, and, perhaps, ruin, shall be its accompaniment, in regard to some of those who were engaged in the old methods * * * * * * when such changes are effected by combinations of capital whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold; the effect being to drive out of business all the small dealers in the commodity, and render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lowered. It is in the power of

the combination to raise it, and the result in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers who were familiar with the business, and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent for a corporation for selling the commodities which he once manufactured or dealt in; having no voice in shaping the business policy of the company, and bound to obey orders issued by others. Nor is it for the substantial interest of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce."

But counsel for plaintiffs in error insist that the statutes prevent common partnerships, joint stock associations and private corporations. That contention is not even plausible. If it was the intention of these acts to prohibit the formation of partnerships, joint stock associations or corporations, why does the act of 1889 define a trust as a "combination of capital, skill or acts, by two or more persons, *firms, corporations or associations of persons,* or either two or more of them, for either any, or all of the following purposes?" What had to be done to form a trust by the combining of two or more persons, two or more firms or two or more corporations? Why prohibit the joining together of two or more corporations, if the corporations themselves are not permitted to exist? Why prohibit the joining together of two or more partnerships if a single partnership is not permitted to exist? Why not in terms prohibit the formation of corporations, partnerships, or joint stock associations? That ought to be a sufficient answer to their suggestion.

But the combination of two or more corporations, or two or more partnerships, or two or more associations is not prohibited for all purposes, but only for the purposes named in the statute. What are they: (1), to create or carry out restrictions in trade; (2), to limit or reduce the production or increase, or reduce the price of merchandise or commodities; (3), to prevent competition in the manufacture, making, transportation, sale or purchase of merchandise; (4), to fix at any standard figure whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, etc.; (5), to make or enter into or execute or carry out any contract, obligation or agreement of any kind or description in restraint of trade, etc. Condensing the pur-

poses for which the combinations must be made in order to come within the purview of the statute, they are for the purpose of fixing the selling price of an article at a standard figure, or to prevent competition. In other words, to create restrictions in trade. Partnerships are not primarily formed for the purpose of creating restrictions in trade. On the contrary, they are formed for the purpose of extending it. They are entered into not for the purpose of destroying competition or fixing any standard prices between competitors, but because their joint capital and combined skill may be necessary for the prosecution of the particular line of business.

Bates' Law of Partnership, Sec. 1.

Kent's Commentaries, 23.

Anderson's Law Dictionary, p. 749.

Bouvier defines a partnership as "An agreement between two or more persons for joining together their money, goods, labor, or skill, or either or all of them, *for the purpose of advancing fair trade*, and of dividing the profits or losses arising therefrom proportionally, or otherwise, between them." (Bouvier's Law Dictionary, title, Partnership.) It seems that there is a vast difference between "*advancing fair trade*," and *restricting fair trade*. The first being the object of the partnership, and the latter of the trust.

A corporation is but a different form of partnership. It is an artificial person created by the combination of several natural persons, whose obligations and responsibilities are defined by law. It is likewise organized for the purpose of prosecuting some business. This view is emphasized by the fact that the statutes in question recognize the legal existence of firms, corporations and associations of persons. They only seek to restrain illegal combinations of these corporations, partnerships or associations of persons, but not the creation of corporations, associations of persons or partnerships. It is clear that it never occurred to the Legislature that the existence of corporations, partnerships or business associations would be thereby prevented. If such had been the intention of the Legislature, it would have said so in plain and explicit terms.

The Supreme Court of Texas differs from learned counsel for plaintiffs in error on this question. That learned court, speaking through Associate Justice Denman, has said:

"In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts by two or more. . . . If we

consider the purpose for which the combination must be formed to come within the statute, the essential meaning of the word 'combination,' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced, is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes." (Meaning the purposes mentioned in the statute). (Gates v. Hooper, 39 S. W. Rep., 186; 90 Tex., 563).

This ought to be conclusive, on the well settled rule that a construction placed on a statute of a State by its own courts will be conclusive as to the legislative intent.

Combinations in restraint of trade have been prohibited for centuries. As has been stated, "The rule that contracts in restraint of trade shall be void as against public policy is among our most ancient inheritances; as early as the second year of Henry V., A. D. 1415, we find by the Year Book that this was considered to be an old and settled law." (Spelling on Trusts and Monopolies, Sec. 4.) Yet, during all of this period, partnerships were legal.

The Federal Congress passed an act on January 2nd, 1890, to the effect that "every contract, combination in the form of a trust *or otherwise* or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal." This court has held that that act applied to all contracts entered into for the purposes named, and yet I presume that it never entered the mind of this court that Federal corporations, like the Texas Pacific Railway Company, and others, should be dissolved, or that partnerships doing an exclusive interstate business, not organized for the purpose or restraining trade, but rather to extend it, should be from that date unlawful. Yet to follow the argument of learned counsel for plaintiffs in error that must be the result. But the formation of corporations or joint associations or partnerships does not necessarily result in the destruction of competition, or in the restraint of trade. Counsel for plaintiffs in error may insist that the motives of a partnership cannot always be ascertained except by results. They may invoke the old legal maxim that every person is presumed to intend the reasonable and probable results of his own action. They may insist that the reasonable and probable result of a partnership, firm or corporation is to create restrictions in trade and destroy competition, and therefore that persons, firms, corporations or associations of persons must be presumed

to have been formed for that purpose. The logic is absurd. We deny that the reasonable or probable result of forming a partnership or a corporation is to create restrictions in trade or destroy competition, or do any acts prohibited by the statutes in question. For example, take any city or town in the United States in which one dozen firms are doing business. Does it make competition any less because these dozen mercantile establishments are conducted by firms or corporations, rather than by single individuals? Are there not twelve competing factors in each of these towns or cities, as the case may be, and whether the entities that make these factors are artificial persons or whether they are partnerships, is not the competition the same? To illustrate further, suppose that the town has twelve business partnerships in it. Would it increase the competition for one person to retire from each of these twelve firms? Would it facilitate the trade? It seems not. Put it another way: Suppose twelve men are engaged in the mercantile business in a town, each in competition with the other, and conducting an establishment of his own. Suppose each of these takes unto himself a partner, which makes the number that is engaged in the mercantile business in that town twenty-four. Has the trade been restricted? Has competition been destroyed or even lessened thereby? It is granted that it is possible to create a partial restriction in trade by the formation of a partnership, but the restriction would be temporary only. Competition would come again. But no man is presumed to intend the *possible* results of his own action. If partnerships and corporations were destroyed, it might result in destroying competition to a greater extent than their existence could possibly do. To illustrate, suppose A. and B. desire to enter into a mercantile business in competition with a firm already in existence. Neither A. nor B. have sufficient capital to conduct the business. But by combining their capital they could make it successful. If they are prevented from forming the partnership, the competition will not exist. If they are permitted to form a partnership, competition will be created. It is plain, therefore, that if they are prohibited from forming partnerships no competition can be had. It is equally plain that instead of partnerships and corporations creating restrictions in trade, they are absolutely necessary in some instances to create competition in trade. Suppose that it be sought to build a railroad through Texas which would be parallel and in com-

petition with a line already in existence. No single individual can build that road. If a corporation can not be organized competition becomes impossible. It must follow, therefore, that the major premise of the counsel for plaintiff in error, to the effect that the formation of partnerships and corporations creates restrictions in trade is erroneous. Therefore, the conclusion deduced therefrom to the effect that the statute was designed to prevent the ordinary business association is erroneous.

It is always possible to create temporary restrictions in trade by the formation of partnerships or corporations. It is possible for two merchants living in the same town to form a partnership, and in that way destroy competition between themselves. But if there is room for two establishments, if the trade will justify competition, it will enter, and the result will be beneficial rather than hurtful to society in that it will give the particular village or town sufficient capital and skill to carry on the trade. Perhaps neither of these two merchants left by himself would be able to conduct the business of the character which the needs of the particular community would demand. If it be conceded that the possible results of the partnership or corporation be to create restrictions in trade, still it will not follow that the people forming the partnership must have intended such a result. The rule when most strictly applied is that people are only presumed to attend the reasonable and probable result of their own action, but they are not always held responsible for the possible results of their own action. Take the New York Central Railroad for illustration. It was built for the purpose of transporting freight and passengers. It was a necessary aid to commerce. It was well known, however, that accidents were possible, and that the operation of the railroad would possibly result in the loss of human life. It could not be said however, that because that was one of the possible results that the corporation was created for that purpose. Take a banking corporation as another illustration. It is formed for the purpose of legitimate gain. All of the stockholders expect to increase the amount of their worldly goods by its successful management. But conditions become such that the business is conducted at a loss, as it frequently is. That is always possible. Must it be stated that the stockholders entered into this corporation for the purpose of losing their money because such a result was possible? Surely such a contention approaches the absurd.

yet it is the contention of learned counsel for plaintiff in error in this case.

But in addition to the foregoing the rule should be remembered that all acts of the legislature must be construed together, and particularly those passed at the same session. The same legislature which passed the act of 1889 passed another act admitting insurance companies into Texas for the purpose of doing business. The act was approved April 3, 1889. It will be noted that the anti-trust act was approved March 30, 1889, only three days before. The act admitting the insurance corporations, so far as applicable, reads as follows:

"That companies or associations organized under the laws of any other State of the United States, carrying on the business of life or casualty insurance on the assessment or natural premium plan, and having cash assets of a sum not less than one hundred thousand dollars, invested as required by the laws of this State regulating other insurance companies, shall be licensed . . . to do business in this State," etc. (See Acts of Texas Legislature of 1889, p. 98).

On the 19th day of March of the same year the same body passed a law authorizing corporations and partnerships to be formed for the purpose of irrigation. So far as applicable it reads as follows:

"When any person, corporation, or association of persons, by compliance with the preceding provisions of this act, shall become entitled to the use of the waters in any river or stream, it shall thereafter be unlawful for any other person, corporation or association of persons, except for domestic use by anyone entitled thereto, to so divert the flow of water in said river . . . ." etc.

Section 10 of the same act reads as follows:

"Corporations may be formed and chartered under the provisions of this act and of the general incorporation laws of the State of Texas, for the purpose of constructing, maintaining and operating canals, ditches, flumes, ..." etc.

The Texas Legislature recognized the legal existence of corporations both before and after the passage of these acts. Their right to exist has never been challenged, but it is only their combinations for the purpose of restraining trade or destroying competition that is prevented. That is all. They stand on the same basis so far as this act is concerned as natural persons do. No one supposes in Texas that the acts prohibit partnerships, and, indeed, no fair construction would justify such a conclusion. This question seems to have been settled by this court in the recent unpublished decision in the case of the United States vs. The Joint Traffic Association.

Do the acts in question undertake to prohibit foreign corporations from doing an interstate business with the citizens of Texas?

There ought to be no contention on that question. The Supreme Court of Texas have settled that question against the position of plaintiffs in error. The Supreme Court in the case of Fuqua vs. Pabst Brewing Co., 38 S. W. Rep., 30, in discussing the contract made the basis of the suit in that case said:

"The parties contracted for the sale and purchase of beer to be transported from Milwaukee, Wis., to Amarillo, Texas, to be there delivered to Kingsbury and become his property. So far the transaction was interstate commerce and not subject to State regulation without the consent of Congress, *nor did the statute* (meaning the statute in question) *undertake in any way to regulate or prohibit same.* But the parties by the same contract voluntarily went further and so dealt with the subject after it had ceased to be an article of interstate commerce as to create a trust as above shown, in violation of the statute."

The Supreme Court having determined what the statute meant, I presume their construction will be accepted by this court. Besides that, the language of the act itself does not justify the contention of counsel for plaintiffs in error. There is a marked difference between a corporation doing business within the State, and one doing an interstate business with its citizens. This court has many times determined that each State has a right to dictate the terms upon which foreign corporations do business within its limits. (Pembina Mfg. Co. vs. Pennsylvania, 125 U. S., 183, and other authorities herein previously cited.) But the Supreme Court throughout its decisions heretofore and since made have recognized what everybody else recognizes, that the States have no right to prevent interstate commerce. What the statute was attempting to do was to prevent their doing business within this State. The reasonable construction ought to be placed on it, and not an unreasonable one. Therefore the judgment of the trial court in giving to the statute the same construction that the Supreme Court had given it, to the effect that the decree of injunction rendered in this case should in no sense interfere with the interstate business of a corporation, was entirely right, so as to relieve the officers whose duty it was to execute the decree without any misapprehension of its terms. Whether he had put that proviso in it or not would not have affected the decisions.

The statutes of 1889 and 1895 do not undertake to prohibit the commission of any act done in any State other than Texas, and

therefore, the argument of the plaintiffs in error on that point is gratuitous. The section of the statute which they insist violates the Constitution in this respect reads as follows:

"Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act which do not in their commission, necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State."

It will be observed that it only makes liable persons without the State for the commission of an act which does not necessarily require the personal presence in the State. There are many such acts and in asserting this doctrine they were not travelling unbeaten paths. It is well settled that a man may commit a crime in another State without ever going within its borders. For instance: a Texas merchant may write a letter to a New York merchant and obtain goods delivered to him on board the cars in New York. The Texas merchant receives them through his agent and transports them to his home. These goods may be obtained upon false representations sufficient to violate the criminal statutes of New York and yet, the Texas merchant may never have been within the limits of New York State. A Texas banker can defraud a New York banker by similar methods, and yet the Texan may never have reached New York. He is guilty of a criminal act, however, and may be punished therefor if ever caught within the limits of New York State.

The conspiracy may be formed to steal live stock in Texas—cattle and horses. In the consummation of the unlawful purpose it may be necessary to have several parties employed, all with guilty knowledge. Some of these parties may be located out of the State for the purpose of disposing of this stolen property, but knowing that it is being stolen. Certainly he would be violating the criminal laws, although he was out of Texas, while the crime was being actually committed in Texas, but he knew of its commission, aided in its commission and performed his part. The same may be said of all other crimes. The question usually arising upon that state of facts would be whether or not the parties committing crime were acting together in its commission in Texas, though the personal presence of all of them would not be required. To make people guilty of criminal acts, they need not be in the exact spot where the crime is committed. The distance between them and the place where the crime is actually committed is not even a factor, provided

he knows the crime is being committed and acquiesces and aids therein.

This reasoning would apply with equal force to the crimes of forgery, swindling, counterfeiting and the circulation of forged instruments and counterfeit money.

These questions have been considered many times and particularly in that class of cases in which requisitions have been refused on the ground that the criminal had fled from the State, he never having been within its limits.

Ex Parte Reggel, 114 U. S., 642.

Criminal Law Mag., Vol. 3, p. 804.

Am. & Eng. Ency. of Law (old edition), Vol. 7, pp. 645 and 646 and authorities cited.

Moore on Extradition, Vol. 2, Secs. 578 and 587.

Counsel for plaintiff in error fail to discriminate between acts done *within* Texas by persons out of the State and acts done beyond her limits. But this question becomes immaterial because Section 9 can be eliminated from the statute and yet it be held valid. The construction on that question does not affect the acts shown by the record to have been committed in this case and upon which the judgment of the court was based.

The necessity for the statute is apparent in this case. Here is a Missouri corporation engaged in the sale of oils. It made agreements with its Texas customers to the effect that they should purchase from this company only. On this point I may be permitted to quote from the record:

F. Q. Rast testified that he lives in Cleburne, Texas; that he purchased oil from the Waters-Pierce Oil Company; that he received rebates from the Waters-Pierce Oil Company from the regular price of oil purchased from them (Record, p. 101). That they offered him oil if he would agree to handle the company's product exclusively at three cents per gallon less than he was paying for the oils he was then handling; that he made such contract with them; the understanding was that in order to have the benefit of the rebates of three cents per gallon he was to handle exclusively the Waters-Pierce Oil Company's oils. (Record, p. 102.)

D. F. Hare said he did business in Belton, Texas; said I have received from the Waters-Pierce Oil Company rebates from the

regular price of oil purchased from them when I dealt in oil. It was in the fall of 1894 or the spring of 1895. The consideration upon which I received this rebate was that I should handle only their oils and that would enable me to sell their oils cheaper than others could be sold. (Record, p. 103.)

G. F. Ware testified: I never got any rebate from the Waters-Pierce Oil Company, though I was promised by their agent, J. S. Monroe, at Brownwood, that if I would abstain from handling other oils he would always give me as low price on oils as competitors, if not more so, if I would handle his oil exclusively. (Record, p. 100.) Again, the same witness said: The Waters-Pierce Oil Company and their agent refused to sell me oil because I bought oil from the Cleveland Refining Company and Geo. Rice in Brownwood. (Record, p. 100.)

K. E. Dunning testified that he was a merchant. Said he: The Waters-Pierce Oil Company's agents have refused to sell me oil because I was handling other oil. It was in October, 1895, in the town of Brownwood, Texas. The agent said he was instructed by his company not to sell parties oil who were handling other oil. The Waters-Pierce Oil Company refused to sell me oil because I was handling other oils. (Record, p. 99.)

W. C. Dugger testified that S. L. Pegues, his father-in-law, was the agent of the Waters-Pierce Oil Company, but that he, Dugger, attended to his business; that in pursuance of instructions from the company he went around town in San Marcos, Hays county, and made contracts with about all but three merchants in the town and made contracts to sell them oil at stipulated prices. The number of contracts I made was with about ten or fifteen merchants. They were to get their oil at ten cents a gallon and retail it at fifteen cents. (Record, p. 84.)

A. H. Yarrington testified: I lived at Fairview Park in the city of Austin in 1890. I was engaged in the business of general merchandise and handling illuminating oils. I have had dealings with the Waters-Pierce Oil Company. In 1890 I bought some oil from an Ohio company; do not know their name without looking on the books; after that I made an effort to buy oil from the Waters-Pierce Oil Company, and the agent refused to let me have it unless I would sign an agreement not to buy oils from outside concerns. (Record, pp. 104 and 105.)

T. J. Lovelace testified that he resided in Waco, McLennan county, Texas; that after he had laid in a stock of oil from another concern the Waters-Pierce Oil Company ran the retail price down in Waco lower than he could buy it at wholesale, and that by thus running the retail price of the Waters-Pierce oil down below what I could buy other oil at I was compelled to quit selling oil at all because I could not afford to sell it at less than what I had to pay for it. I could not buy the Waters-Pierce Oil Company's oil at the cut rates because I bought oil from another company. In fact they refused to sell it at any price unless I agreed to buy from no one else but them. (Record, p. 108.)

It was also in evidence that at numerous places in Texas the Waters-Pierce Oil Company had distributing points at which they had large reservoirs into which oil would be pumped from oil cars and that from these reservoirs the orders of the merchants of Texas would be filled. It was stated that cans of oil were shipped to Texas and perhaps sold by the can or in unbroken packages. (Record, p. 88, 90, 97.)

Numerous witnesses testified to the fact that the Waters-Pierce Oil Company in dealing with them made contracts fixing the price at which they should sell their products. See the testimony of H. Schmidt, R. p. 117; W. F. Hanning, R. p. 116; J. W. Thomason, R. p. 118; Herman Voss, R. pp. 118 and 119; W. A. Bryan, R. pp. 115 and 116.

It was upon this testimony and the testimony of many other witnesses that the verdict of the jury and the judgment of the court was based.

But suppose that the Waters-Pierce Oil Company had not had any place of business in Texas; suppose that they were outside of the State, and yet, would ship oil into Texas in any quantity wanted, not in unbroken packages only, but otherwise, and thus contract with the people of Texas that they must sell their oil at retail in broken packages at a price fixed by the Waters-Pierce Oil Company, would they not be guilty of an offense against the State? Suppose a wholesale merchant in St. Louis, Chicago or New York, undertakes to furnish a Texas merchant with clothing and in doing so makes a contract with the clothing merchant in Texas that after he shall have bought the clothing he must sell it to his customers at a given price, is not the foreign merchant guilty of violating the laws

of Texas? Not by the interstate transaction which ended with the selling and delivery of the goods in Texas, but by reason of the execution of the other contract, that is the price at which the Texas merchant shall sell the goods so purchased to his customers, the citizens of Texas. There is a crime committed without his personal presence. We could not have extradited him under the authorities heretofore cited, because he had never been in Texas and therefore could not be said to have fled from Texas. But under the same authorities if the merchant should ever visit Texas he could be held and ought to be held for the violation of her statutes. But, as before stated, this is not material in this case, because that section of the statute can be eliminated altogether and yet the facts upon which this case was based will support the conviction. It is not an interstate transaction at all. The judge of the court fairly submitted the facts to the jury. The jury found against the plaintiffs in error upon those issues and that finding is conclusive.

M. K. & T. Ry. vs. Haber, 18 Sup. Ct. Rep., 489.

The decisions of the Texas courts upon matters of procedure are recognized as final.

Egan vs. Hart, 165 U. S., 188.

Oxley Stave Co. vs. Butler Co., 166 U. S., 648.

Therefore, there is nothing in the other suggestion that the court should have charged upon reasonable doubt, because that is essentially a question of procedure. But the court of Civil Appeals say that the question as to whether the reasonable doubt should be charged was not properly raised in the court below. (Record, bottom page 179.) The assignments of error did not raise this question and hence, we submit that it cannot be made available for the first time in this court, but even if raised, the Texas courts have settled it as charged by the trial court.

Pace vs. Mortgage Co., 43 S. W., 36.

In this connection we beg to call attention to the learned opinion of the Court of Civil Appeals for a full, able and elaborate discussion of the question involved. (Record, pp. 161 to 179, inclusive.)

It is unnecessary to further advert to the fact that the trial court withdrew from the consideration of the jury the question of the Standard Oil conspiracy and its operation in Texas, for the reason

that the judgment in this case rests on other and distinct agreements made and executed in Texas, which have been heretofore pointed out. In excluding from the consideration of the jury the Standard Oil conspiracy, the trial court erred. The record contains proof most positive of the pernicious effects of the operation of trusts. The Standard Oil agreement was made by a number of wealthy corporations and partnerships. The plaintiff in error in this case claimed that the combination was dissolved, but the claim is unfounded; because the record discloses that the Waters-Pierce Oil Company alone of all the number of corporations and partnerships engaged in the Standard Oil conspiracy sells illuminating oils in Texas, Southern Missouri, Arkansas, Indian Territory, Oklahoma Territory, Louisiana, west of the Mississippi, and Old Mexico; and that the Waters-Pierce Oil Company does not sell illuminating oils in any other portion of the Union. This is not proven by doubtful testimony, but was admitted on the trial of this case by the plaintiff in error. (Record, p. 72.) Is not this a most singular fact? Remembering the depot of supplies of the Waters-Pierce Oil Company is in East St. Louis, general offices are in St. Louis, and it is a Missouri corporation, yet it sells no illuminating oils in all of the vast rich Northwest—Illinois, Ohio, Iowa, Indiana, Nebraska, and other States, nor does it invade the eastern portion of the Union, nor any portion of the South except the territory above named. The Southwest is allotted to it as its peculiar territory in which none of the companies entering into the Standard Oil agreement compete with it. It is absurd to say that this division of territory was the result of accident—it must have been the result of an agreement. Other companies have come into Texas and attempted to compete with the Waters-Pierce Oil Company, but none of these rich concerns entering into the Standard Oil agreement have dared to do so.

As before stated, it is not necessary in the discussion of this case to consider this question except to emphasize the necessity of the statutes in question prohibiting *dealers* from forming trusts and combinations in one State and executing them in another. The Texas statutes ought to be upheld in so far as they tend to prevent such transactions, unless this court is clearly convinced that they are void. All doubts, from the very nature of the case, should be resolved in favor of the people thus struggling to protect them-

selves against these vast combinations which seek to control the prices of the prime necessities of life. The mere fact that the Texas statutes exempt from their operation that character of agreements which could not hurt her people, which could not create monopolies, which could not destroy competition nor fix the standard of prices, ought not to render the statutes invalid. Because it was not to prohibit the harmless agreements that the statutes were passed, but it was to prohibit those that were sapping the very foundations of commerce, destroying competition and fixing a standard of prices—not by the laws of supply and demand, but by the arbitrary agreements of those who control the output of the refineries and of the petroleum fields.

It may be possible that the act in question prohibits some classes of contracts that are not necessarily injurious to society. But it may be that the Legislature found it impossible to exclude from the terms of the legislation in question these contracts. The Legislature cannot always discriminate so closely and nicely. In other words, in prohibiting the evil, some innocent acts may be likewise prohibited, because the innocent acts cannot well be separated from those that are evil. But that does not justify the contention here made by plaintiffs in error, that in order to prohibit the evil they must necessarily prohibit all that is not evil. As before stated, many innocent acts may necessarily be prohibited because incapable of separation from those that are evil. That is to say, incapable of such an exact definition as to render the administration of the law possible. Yet it ought not to be held that innocent acts that are easily separable from the evil or vicious acts should be prohibited in order to make the prohibition of the injurious acts valid. The gaming laws of the several States prohibit many games that are not *malum in se*. They are merely *malum prohibitum*. But to permit those games would open the door to fraud and render it impossible, or at least most difficult, to prohibit those that are evil. But no one ought to be heard to say that all innocent games should be prohibited in order to make the statutes valid.

It is no answer to the suggestion, either, that in preventing these combinations some others may be prevented which are not necessarily harmful. It is not easy for the Legislature, as before suggested,

to exclude from the operation of her statutes every agreement which may or may not be hurtful, because human legislation must be necessarily imperfect in its details. The statutes are clearly within the power of the Legislature to pass, and it is therefore respectfully submitted that they ought to be upheld and the case affirmed.

M. M. CRANE, Attorney-General, and T. A. Fuller assistant
Attorneys for the State of Texas, Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 37

WATERS-PIERCE OIL COMPANY, Plaintiff in Error,

vs.

THE STATE OF TEXAS, Defendant in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

ARGUMENT FOR DEFENDANT IN ERROR.

T. S. Smith,
Attorney General of Texas,
Counsel for Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C. 1-8-1910

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 97.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

I propose to attempt to answer the argument of counsel filed October 10, 1899, which was since the filing of the able and exhaustive brief filed herein for defendant in error by my predecessor, and I shall briefly refer to some of the assignments of error copied in the brief filed herein October 8, 1898.

The three objections urged to the acts of March 30, 1889, and of April 30, 1895, of the State of Texas are as follows:

I. Make penal all associations of two or more persons for business purposes.

II. Render it impossible for two or more persons associated to carry on business; and

III. That the right of persons to associate and carry on business is one of the liberties protected by the fourteenth amendment to the Federal Constitution.

I shall treat the first two objections together. It occurs to me that the position is untenable that either act prevents the voluntary association of two or more persons to form partnerships or corporations to deal in commodities and merchandise, and to transact any business—commercial, banking, railroading, or otherwise—the object and effect of which is no innovation in business transactions, and which does not pretend and propose to *create* and *carry out* restrictions in the full and free pursuit of any business authorized or permitted by law.

Nowhere in either act is any association or combination inhibited except for specified purposes, each purpose clearly stated and connected with and denounced by the act as unlawful, because either it is a monopoly or a restriction in free and full pursuit of lawful business and impairs the open market, or an agreement to carry out contracts interfering with open competition and unrestricted competition among themselves and others, and to prevent the formation of any such contracts. Nowhere is it pretended to "prevent the association of two or more persons for business purposes"—lawful business purposes, honest business purposes. On the contrary, the legislature of Texas, during the same session that it passed the act of April 30, 1895, passed an act amending the law authorizing the association of persons into private corporations, and named over fifty different purposes for

which private corporations may be formed; and in 1897 the legislature of Texas again amended the incorporation act and enlarged and increased the number of the purposes for which private corporations could be formed.

And it is part of the history of the country that hundreds of private corporations organized under the laws of the State of Texas, and as many more organized under the laws of the various States of the Union, are daily doing business in Texas under and subject to her laws, and fostered and protected by the State, her laws, and her courts. It is only the modern trust that the acts of 1889 and 1895 are attempting to declare unlawful and to prevent doing business in Texas. I believe the State of Maine was the first State in the Union which passed an anti-trust law, and Texas followed, either the second or third, with the act of 1889. And the decision of our own supreme court in the case of Queen Insurance Co. *vs.* Texas, 86 Texas, 250, wherein the court declared that by the terms of the act of 1889 insurance was not included in any of the terms of said act, and that it was not trade or commerce, but was an aid to commerce, was to a large degree the necessity for the act of 1895, and in subdivision 1 of section 1 thereof will be found the term "restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State."

Again recurring to the laws of Texas to answer the first two objections quoted from counsel's written argument. The Revised Statutes of 1879 and of 1895 of the State of Texas contain provisions authorizing the formation of partnerships and limited partnerships and

provide for the protection of the members of the same, and make ample provision for the limiting and protecting the liability of a partner in a limited partnership who contributes a specified sum to the concern, and never have the laws of Texas attempted to embarrass the investment of capital or the pursuit of any business by individual associations, partnerships, or corporations unless the object, intent, and purpose was to restrain trade or commerce or in some way to create and carry out restrictions in the full and free pursuit of business authorized and permitted by the laws of our State and country.

This court has not been cited to any case in Texas where under either act of the legislature any association of two or more persons for business purposes has been restrained, made penal, or even interfered with. No argument is made that plaintiff in error was engaged in fair and legitimate business. The record shows the character of business it was carrying on.

Where any competition arose to the plaintiff in error it decreased the price of oil there; would not sell to any dealer who bought oil from any other person, and it fixed the price at which dealers must sell, and restricted and controlled arbitrarily the price of oil in the State of Texas.

To show the character of business which the law, in my judgment, intended to prohibit and which it should prohibit, I trust I will be pardoned for repeating some of the testimony as shown by the record, to show, if necessary, the character of business transacted by plaintiff in error in Texas under its permit granted by the State. Witness Rast testified that he purchased oil from Waters-Pierce Oil Company; that he received rebates from

Waters-Pierce Oil Company from regular price of oil purchased from them (Record, p. 101); that they offered him oil, if he would agree to handle the company's product exclusively, at three cents per gallon less than he was paying for the oils he was handling; that he made such a contract with them; the agreement was, that in order to have the benefit of the rebates of three cents per gallon he was to handle exclusively the Waters-Pierce Oil Company's oil (Record, p. 102).

Witness D. F. HAIR lived in Belton, Texas. He had received from the Waters-Pierce Oil Company rebates from the regular price of oil purchased from them. It was in the fall of 1894 or spring of 1895. The consideration upon which I received this rebate was that I should handle only their oils, and that would enable me to sell their oils cheaper than others could be sold (Record, p. 103).

G. F. WARE testified:

I never got any rebate from Waters-Pierce Oil Company, though I was promised by their agent, J. S. Monroe, at Brownwood, Texas, that if I would abstain from handling other oils they would always give me as low price on oils as other competitors, if not more so, if I would handle his oil exclusively. The Waters-Pierce Oil Company and their agent refused to sell me oil because I bought oil from the Cleveland Refining Company and George Rice, in Brownwood, Texas (Record, p. 100).

K. E. DUNNING testified:

The Waters-Pierce Oil Company's agents refused to sell me oil because I was handling other oil. It was in October, 1895, in town of Brownwood, Texas. The agent said he

was instructed by his company not to sell parties oil who were handling other oil.

The Waters-Pierce Oil Company refused to sell me oil because I was handling other oils (Record, p. 99).

W. C. DUGGER testified that his father-in-law, S. L. Pegues, was the agent of the Waters-Pierce Oil Company, but that he, Dugger, attended to his business; that in pursuance to instructions from the Waters-Pierce Oil Company, he went around town in San Morcos, Hays county, Texas, and made contracts with about all but three merchants in the town, and made contracts to sell them oil at stipulated prices. The number of such contracts made was with ten or fifteen merchants. They were to get oil at ten cents a gallon and retail it at fifteen cents a gallon (Record, p. 82).

A. H. YARRINGTON testified:

Lived at Fairview Park, in the city of Austin, Texas, in 1890; was engaged in general merchandise business and handling illuminating oils. I have had dealings with Waters-Pierce Oil Company. In 1890 I bought some oil from an Ohio company; do not remember their name without looking on my books. After that I made an effort to buy oil from the Waters-Pierce Oil Company, and the agent refused to let me have it unless I would sign an agreement not to buy oils from outside concerns (Record, pp. 104 and 105).

T. J. LOVELACE testified that he resided in Waco, McLennan county, Texas. In 1892 I bought oil shipped here by George Rice, and the Waters-Pierce Oil Company refused to sell me oil at any price. The Waters-Pierce Oil Com-

pany did interfere with my sale of other oils, and their interference consisted in this: I had bought Rice's oil, and Waters-Pierce Oil Company cut the price and sold at retail at less than I had bought wholesale; and after said Waters-Pierce Oil Company had reduced the price in this way they refused to sell me at the reduced price. By running the oil at retail below what I paid at wholesale, I was forced to quit selling oil at all (Record, p. 108).

J. A. CROOKS: Resides at Waco, McLennan county, Texas. I handled George Rice's oil, and the result was that I had to quit business. I couldn't compete with the cut prices inaugurated by Waters-Pierce Oil Company whenever I bought Rice's oil and placed it on the market (Record, p. 109).

This witness details how his customers were driven from him, and how he was forced out of competition with Waters-Pierce Oil Company (Record, p. 109).

The testimony of a number of other witnesses in different parts of the State is to same effect, but I will not prolong the quotations.

Thus it is shown that the plaintiff in error was not prohibited by either act complained of from carrying on a legitimate business in Texas.

Chief Justice Fuller, delivering the opinion for the Supreme Court in the Sugar Trust case (156 U. S., p. 16), said:

"All the authorities agree that in order to vitiate a contract or combination, it is not essential that it should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

This was sufficient ground for the State to cancel the permit to do business in the State.

The third objection and criticism against the statutes, "That the right of persons to associate and carry on business is one of the liberties protected by the fourteenth amendment to the Federal Constitution," I cannot agree with as even a correct abstract proposition of law.

The fourteenth amendment provides that—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The meaning of these privileges and immunities has been defined by the courts as those rights which are fundamental under any free government, including the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, *subject to such restraints as Government may prescribe for the general good of the whole.* All trusts and monopolies in any trade or merchandise or commodity are an invasion of these privileges, for they encroach upon the liberty of the citizen to acquire property and pursue happiness, and to barter and purchase in an open market.

It is true, plaintiff in error is a corporation organized under the laws of the State of Missouri, and is therefore, I admit, a citizen of the United States. But no corporation organized under the laws of one State can do business in another State (barring interstate commerce) without the consent of the State within which it proposes to do business.

Pembina Mining Co. *vs.* Penn, 125 U. S., 183.

No State can have power to create a monopoly in any industry by incorporating a number of men into one body without doing violence to the Constitution of our country; and what it cannot do directly it cannot do by indirection. The incorporation of any body of men with monopolistic power is in contravention of the spirit and form of our Government and its written Constitution; and when organized trusts and combines are possessed of such monopolistic powers and tendencies, and exert them, as was shown that the Waters-Pierce Old Company did exert in the State of Texas, then they should be abolished or prohibited from doing business in the State. I deem it just to refer to the judgment of the district court in this case to show that only the right to do business in Texas was enjoined, and that its interstate-commerce business was not attempted to be prohibited.

The specifications of error may be stated to include two general errors: One, that the court of civil appeals of Texas erred in not finding the two acts of the legislature were in violation of the fourteenth amendment to the Constitution of the United States, and the other that the court erred in holding with the trial court that the controversy was of a civil nature and in refusing to hold it of a criminal nature, and should therefore have instructed the jury—

"That if upon all the evidence the jury should entertain a reasonable doubt of the guilty participancy of plaintiff in error in any unlawful acts of its agents, then the jury would find for the plaintiff in error, the case being one essentially criminal in all its features and not a controversy of a civil nature."

Answering the first objection, I submit that—

This law deals alike with all of a certain class, and is not obnoxious to the charge of a denial of equal protection before the law.

This proposition of law, I believe, can be fairly applied to both the acts of 1889 and 1895, and, if so, the law will be sustained as not being hostile to the protective clauses of the fourteenth amendment of the United States Constitution.

Hayes *vs.* Missouri, 120 U. S., 68.
Railroad Co. *vs.* Mackey, 127 U. S., 205.
Walston *vs* Nevin, 128 U. S., 578.
Bell's Gap R. R. *vs.* Pennsylvania, 134 U. S., 232.
Pacific Express Co. *vs.* Seibert, 142 U. S., 339.
Giozza *vs.* Tiernan, 148 U. S., 657.
Columbia So. R'y *vs.* Wright, 151 U. S., 470.
Marchant *vs.* Penn. R. R., 153 U. S., 380.
St. Louis and San Francisco R'y Co. *vs.* Mathews, 165 U. S., 1.

I submit that the exemptions in Texas statutes under consideration are neither arbitrary nor unreasonable, but rest upon a basis which has a reasonable and just relation to the subject-matter to which the classification is proposed.

In the case of Gulf, Colorado and Santa Fe R'y Co. *vs.* Ellis, 165 U. S., on page 163, in the opinion of the majority of court Mr. Justice Brewer, after reviewing a line of decisions of the State courts on statutes allowing attorneys' fees to one of litigants against corporations, mostly railway corporations, cites an Arkansas case and uses the following language:

"It is worthy of note that in the same volume is found a decision by the same court sustaining a statute allowing an attorney's fee in actions for the recovery of overcharges by railroads (Dow *vs.* Beidelman, 49 Ark., p. 455); but the statute had prescribed the rates of charge for the carriage of passengers by railroads, had forbidden an overcharge, and it was as a penalty for failure to comply with such police regulations that the allowance of an attorney's fee was sustained."

In the case of Missouri *vs.* Lewis, 101 U S., 22, 31, Mr. Justice Bradley said:

"We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. * * * The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies."

And in the case of Commonwealth *vs.* Alger (7 Cush., 53, 84), Chief Justice Shaw said:

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community."

On the complaint and assignment of error that the said statutes violate the Constitution of the United States, because they in their natural operation and effect deprive many citizens and persons of their property without due process of law, I respectfully cite the case of Holden *vs.* Hardy, 169 U. S., 380, and the opinion of Mr. Justice Brown in said case, as, in my judgment, a complete answer and refutation of this assignment, and as also very strong authority answering the other errors complained of.

NOT A CRIMINAL CASE.

An information in the nature of a *quo warranto* is essentially a civil suit brought in the name of the State to oust one who holds an office in violation of law or a corporation exercising franchises which it has forfeited, and as to all matters of pleading, evidence, process, and practice it is governed by the same rules applicable to all other civil causes.

AUTHORITIES.

2 Spelling Ex. Relief, sec. 1846.
Beach on Monopolies and Trusts, sec. 222.
State of Texas *vs.* De Gress, 53 Texas, 387.
City of East Dallas *vs.* The State, 73 Tex., 374.

I respectfully refer this court to the opinion of our court of civil appeals (Record, pp. 167 to 180), and also submit that this judgment should be affirmed.

T. S. Smith,
Attorney General of Texas,
Counsel for Defendant in Error.

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WATERS-PIERCE OIL COMPANY *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

No. 97. Argued January 8, 9, 1900. — Decided March 19, 1900.

It is well settled that a State has the power to impose such conditions as it pleases upon foreign corporations seeking to do business within it.

The statute of Texas of March 30, 1890, prohibiting foreign corporations, which violated the provisions of that act, from doing any business within the State imposed conditions which it was within the power of the State to impose; and this statute was not repealed by the act of April 30, 1895, c. 83.

THE Waters-Pierce Oil Company is a private corporation incorporated under the laws of Missouri, and its principal offices are situated in St. Louis.

It was incorporated to deal in naval stores, and to deal in and compound petroleum and other oils and their products, and to buy and sell the same in Missouri and other States. Its capital stock was originally one hundred thousand dollars, but was subsequently increased to four hundred thousand dollars.

On the 6th day of July, 1889, it filed in the office of the secretary of state of Texas, in accordance with the requirements of law, a certified copy of its articles of incorporation, and secured a permit to transact business in the State for the term of ten years.

By virtue of the permit the company engaged in business in the State, and while so engaged, it is claimed, violated the statutes of the State against illegal combinations in restraint of

competition in trade, (copies of the statutes are inserted in the margin,)[1] and thereby incurred a forfeiture of its permit to do business in the State.

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[1] SEC. 1. Be it enacted by the Legislature of the State of Texas, That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them for either, any or all of the following purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. Fourth—To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State. Fifth—To make or enter into, or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves or others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or district or county attorney, or either of them, upon his own motion, and without leave or order of any court or judge, to institute suit or *quo warranto* proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis County, in the name of the State of Texas.

This suit is brought to enforce such forfeiture, and was tried in the district court of Travis County, Texas, before the court

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SEC. 5. That the provisions of chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by *quo warranto*, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or orders thereunder, or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act, it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

SEC. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions whether within or without the State.

SEC. 10. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or where either of the offenders reside, or in Travis County, and it shall be the duty of the attorney general or the district or the county attorney to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

and a jury. A verdict was rendered against the company, upon which a judgment was duly entered. The judgment was affirmed by the Court of Civil Appeals, (19 Texas Civ. App. Rep. 1,) and this writ of error was sued out in due course.

SEC. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State.

SEC. 13. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.

Approved March 30, 1889. Acts of 1889, p. 141, c. 177.

The Act of 1895.

Chapter 83.—[H. B. No. 404.] An act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act.

SEC. 1. Be it enacted by the Legislature of the State of Texas, That an act entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the State of Texas," approved March 30, 1889, be so amended as to hereafter read as follows:

SEC. 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade, (or commerce, or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.)

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article

The pleadings are very voluminous, alleging the grounds of action and the grounds of defence, with much elaboration and many repetitions.

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or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its price might in any manner be affected.

SEC. 2. That any corporation holding a charter under the laws of the State of Texas which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

SEC. 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the attorney general or district or county attorney, or either of them, upon his own motion and without leave or order of any court or judge, to institute suit or *quo warranto* proceedings in Travis County, at Austin, or at the county seat of any county in the State where such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise and the dissolution of its corporate existence.

SEC. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings in the district court of Travis County, in the name of the State of Texas.

SEC. 5. That the provisions of chapter 48, General Laws of this State, approved July 9, 1879, to prescribe the remedy and regulate the proceedings by *quo warranto*, etc., shall, except in so far as they may conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this act.

SEC. 6. If any person shall be or may become engaged in any combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of either two or more of them, for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce.

4. To fix at any standard or figure whereby its price to the public shall be in any manner controlled or established any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this State.

The basis of the action is an agreement which is set out in full in the complaint, made on the second day of January, 1882,

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5. To make or enter into or execute or carry out any contract, obligation or agreement of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves and others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such article or commodity that its prices may in any manner be affected, or aid or advise in the creation or carrying out of any such combination, or who shall as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, directions, conditions or orders of such combinations, shall be punished by fine of not less than fifty nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense.

SEC. 7. In any indictment for an offense named in this act it is sufficient to state the effects or purposes of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how, when or where it was created.

SEC. 8. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust or combination alleged may be established by proof of its general reputation as such.

SEC. 9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this act, which do not in their commission necessarily require a personal presence in this State, the object being to reach and punish all persons offending against its provisions, whether within or without the State.

SEC. 10. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed, or

between a great many firms and partnerships, individuals and corporations, owning and controlling a large amount of the money and capital invested in the production of petroleum and its products, and in their shipment and sale.

The parties to the agreement embraced three classes: (1) certain partnerships and corporations, of the number of eleven; (2) certain individuals, of the number of forty-four, who are enumerated; and (3) a portion of the stockholders and members of other corporations and limited partnerships, twenty-five being enumerated, one of which was the Waters-Pierce Oil Company. Other individuals, partnerships and corporations could after-

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where either of the offenders reside, or in Travis County, and it shall be the duty of the attorney general or the district or county attorney to prosecute for and recover the same.

SEC. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

SEC. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this State; provided, this act shall not be held to apply to live stock and agricultural products in the hands of the producer or raiser, nor shall it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages.

SEC. 13. That nothing in this act shall be held or construed to affect or destroy any rights which may have accrued, or to affect the right of the State to recover penalties, or to affect the right of the State to forfeit charters of domestic corporations and prohibit foreign corporations from doing business in this State, or affect the right of the State to maintain prosecutions for violations thereof, under any law of this State relating to trusts, for acts heretofore done.

SEC. 14. Any court, officer or tribunal having jurisdiction of the offense defined in this act, or any district or county attorney or grand jury, may subpœna persons and compel their attendance as witnesses to testify as to the violation of any of the provisions of the foregoing sections. Any person so summoned and examined shall not be liable to prosecution for any violation of said sections about which he may testify fully and without reservation.

SEC. 15. All laws or parts of laws in conflict with this act are hereby repealed.

SEC. 16. Whereas, the people of this State are without an adequate remedy against trusts, therefore an emergency and imperative public necessity exists requiring that the constitutional rule which requires that all bills shall be read on three several days, be suspended, and it is so enacted.

Approved, April 30, 1895.

wards join upon the request of the trustees provided for by the agreement.

It was mutually agreed that a corporation should be formed in Ohio, New York, Pennsylvania and New Jersey, or any existing corporation could be used, to mine, manufacture, refine and deal in petroleum and all its products and all the materials used in such business, and transact other business collateral thereto.

To the several corporations thus organized all the business, rights and stock of the parties to the agreement were to be transferred, and trust certificates issued in consideration thereof.

It is averred that the object of the parties in entering into said agreement and trust was to control and monopolize the petroleum industry in the United States and the several States thereof, and the business of manufacturing, refining, selling and transporting petroleum and its products, refined, illuminating and lubricating oils, and that they intended to and did create, make and effect a combination of their capital, skill and acts for such purposes and for the following purposes, to wit:

"1st. To create and carry out restrictions in trade in petroleum and its products, refined, illuminating and lubricating oil, in the United States, and in the domestic trade of the States thereof.

"2d. To increase the price of petroleum and its products, same being commercial commodities and of prime necessity to the people.

"3d. To prevent competition in the manufacture, sale and purchase of petroleum and its products.

"4th. To fix at a standard figure the price of petroleum and its products, whereby the price of the same to the public shall be controlled and established, petroleum and its products being commodities of merchandise, intended for use and sale in the State of Texas as well as other States.

"5th. For the purpose of agreeing, obligating and binding themselves not to sell, dispose of or transport petroleum and its said products below a common standard figure, and to keep the price of petroleum and its products at a fixed or graded figure, and establish and settle the price of petroleum and its products

between themselves and others, and to preclude a free and unrestricted competition among themselves and others in the sale of petroleum and its products, and for the purpose of pooling, combining and uniting any interest they should and did have in connection with the sale of petroleum and its products, that the prices of same might be affected."

That the trustees provided for in said agreement proceeded to execute it, and are still executing it, and for such purpose have divided the markets of the United States in various subdivisions, and one of them is composed of Southwestern Missouri, Arkansas, Texas, Indian Territory, Oklahoma Territory and a part of Louisiana.

That the means employed to effect the purpose of the agreement is to reduce prices below what is reasonable in order to destroy competition, and when it is destroyed raise them again above the market price. A member of the trust is indemnified against loss by the combined power and wealth of all of its parties.

That the Waters-Pierce Oil Company has become a party to said agreement through the control that the trustees acquired by a transfer of stock of the oil company to them, and that the company has taken no corporate action against the transfer of such stock or such control, but has acquiesced in both, and, "through its directors, officers and agents conforms its corporate action to the policy fixed by said nine trustees, . . . and pursues . . . and executes the purposes and objects of said trust agreement above set out in this State."

That in pursuance of the policy of said agreement it confines its business in the subdivision aforesaid, does not invade or transact business in any other; that no other party to the agreement transacts business in the territory allotted to and accepted by the Waters-Pierce Oil Company, and the latter adopts and pursues the methods of driving out and overcoming competition in the sale of oils that are adopted and pursued by the other members in the territory allotted to them; that in the market of Texas there is no competition between the Waters-Pierce Oil Company and such other parties; and that by reason of the facts stated the Waters-Pierce Oil Company has monopolized and still

monopolizes the trade in petroleum and its products in Texas, and performs the unlawful purpose of said trust agreements "in reference to the trade in said commodities which are of prime importance and necessity to the people of the State."

That since the 6th day of July, 1889, the oil company has made contracts, sometimes in writing and sometimes verbally, with merchants and others through its agents in this State, in consideration of a small rebate on the oil purchased, or for other considerations unknown to the plaintiff, whereby the said merchants have contracted not to buy any oil from any other person or corporation, but will "deal with and buy and sell oils obtained from said defendant company exclusively," and in some instances agreed with said company not to sell the oils so bought to any one buying from or dealing with any other person or corporation dealing in oils in competition with the defendant.

The names of some of the persons and merchants are given.

That about the year 1890 the defendant company entered into contracts with certain jobbers and merchants of the city of Brownsville, whereby they respectively agreed to buy all the oil needed in their respective businesses of the defendant company for various rebates on the box or gallon, and they were respectively to sell such oil to retail dealers at the invoice price fixed by the company, and various penalties were agreed to be paid to the company if oil should be purchased from any one else, and that business was done under said contracts until certain dates in the latter part of December, 1896.

That the company is seeking to renew all of said contracts, and is seeking to carry on its business in said city under the same.

That the Eagle Refining Company is a corporation legally incorporated in Ohio for the purpose of manufacturing, refining, compounding and dealing in all kinds of oils, greases and petroleum and its various products, and duly obtained a permit to do such business in the State of Texas on the 6th day of November, 1891, and began to transact such business in the State "in honest and sharp competition with the Waters-

Pierce Oil Company," and continued to do so up to the 13th day of October, 1894, when the two companies "entered into a certain combination and trust," the exact terms of which are unknown to petitioner, whereby the oil company secured the control of all the property, business and franchises of the Eagle Company, and the latter agreed to withdraw from doing any business in the State in competition with the oil company for fifteen years.

That since said date the oil company has been doing business in the name of the Eagle Company in apparent, but not real, competition with itself, and that said contract has affected the production of petroleum and has affected also the sale of its products.

It is also averred that prior to the year 1890 one C. W. Robinson was engaged in the oil business in competition with the oil company, and that some day in that year the company entered into an agreement with him by the terms of which the company secured the control and management of his business, although it is conducted in his name; that by the terms of the agreement he is to buy and sell exclusively the oils of the company, and the agreement is still in force.

That the contracts and agreements with the merchants aforesaid and with the Eagle Refining Company and said Robinson were for the purposes hereinbefore enumerated, and resulted in effecting such purposes.

That the oil company, since its permit to do business in the State, has abused its franchises and privileges; has monopolized the oil trade in the State; has unlawfully entered into the contracts mentioned above, and is engaged in making similar ones; has lowered the price of its oils against competing oils below a reasonable and fair market price; either has refused to sell or would sell only at an exorbitant figure to any person who dealt in competing oils; has pursued and carried out a system of threats and intimidations and bribery to prevent parties from buying or selling competing oils; has threatened those dealing in such oils with a ruinous reduction of price, has given rebates to buyers from it as an inducement not to patronize a competitor, has offered money or the pay-

ment of expenses incident thereto, to get and induce parties ordering competing oils to countermand the orders, and refuse to take the same after contracting therefor. That this is the general course of dealing pursued by the oil company, and when competitive oils are driven out of the market thereby it raises the price of oil far above the true and reasonable market value of the same.

That such course of dealing has resulted in the complete monopolization by the oil company with the oil trade of the State, and is still stifling and threatening legitimate competition to the great injury of the people of the State.

That by reason of the acts detailed the oil company has forfeited its right and permit to do business in the State.

To the petition of the State the oil company demurred and answered. In its demurrer it urged the repugnancy of the statutes of the 1889 and 1895 to the Fourteenth Amendment of the Constitution of the United States, and the insufficiency of the allegations of the petition as a ground of forfeiture of its permit to do business in the State. In its answer it denied generally and specifically those allegations, claimed the permit as a contract, and invoked the Constitution of the United States against its impairment by a subsequent law of the State; claimed to be engaged in interstate commerce, and denied the jurisdiction of the State to regulate it.

There was evidence submitted on the issues, but the court instructed the jury that the evidence was not sufficient to show that the oil company became a member of or entered into the Standard Oil Trust agreement. Also that the contracts with the Eagle Refining Company and with C. W. Robinson were not in violation of the laws of the State, and confined their consideration to their bearing upon the course of dealing of the company in the State.

The court also withdrew transactions of interstate commerce from the consideration of the jury, and submitted only those of local business.

Applying the facts of the case to the definitions of the statutes, the court instructed the jury as follows:

"Now, if you find from the evidence that the defendant com-

pany, acting through its duly appointed and authorized agents, entered into and performed a contract in the State of Texas with any of the parties dealing in, buying and selling oils, as named and set out in plaintiff's petition, since July 6, 1889, by the terms of which contract it was agreed that said parties were to buy oil from the defendant company exclusively for a specified time and from no other source, in consideration of rebates allowed them by defendant company, or for any other valuable consideration, or if you find that said company, so acting through its duly appointed and authorized agents since said date, made, entered into and carried out a contract in this State with any of the persons named and as stated in plaintiff's petition, by the terms of which said parties bound and obligated themselves for a valuable consideration to buy all the oils from defendant company, and not to buy oils from any other source for any specified time, and not to sell said oils so bought from defendant company to any person handling or dealing in oils in competition with defendant company, or if said defendant company, so acting since said date, made and entered into and carried out in this State a contract with any of the parties as stated and named in plaintiff's petition, by the terms of which said parties, for a valuable consideration, bound and obligated themselves to said company, either verbally or in writing, to buy all their oils exclusively from defendant company and from no other source, and to sell said oils so bought to other parties desiring to purchase the same at a price fixed by said company's officers or agents, and you further find that said sales of oils were not interstate commerce, as that is hereinafter explained to you, and that said officers or agents so acting for said company in making said contracts, if any were so made, were acting in the scope of their employment and duty, and were authorized to make such contracts by the governing officers of said company, or that said governing officers, with a knowledge that said contracts had been made, consented to and ratified or carried out the same after they were made, then you are instructed that the defendant would be guilty of violating the laws against trusts of this State, and if you so find the facts to be as above stated you will return a verdict for the plaintiff against the defendant Waters-Pierce Oil Company."

Counsel for Parties.

The jury rendered a verdict against the defendant company, but in favor of the individual defendants, upon which the following judgment was entered against the company:

"It is therefore ordered, adjudged and decreed by the court that the defendant, the Waters-Pierce Oil Company, be, and is hereby, denied the right and prohibited from doing any business within this State, and that its permit to do business within this State, heretofore issued July 6, 1889, by the secretary of state of this State, be, and the same is hereby, cancelled and held for naught, and that said defendant, the Waters-Pierce Oil Company, its managers, superintendents, agents, servants and attorneys, be, and are hereby, perpetually enjoined and restrained from doing business within this State.

"Nothing herein shall be construed to in any way affect or apply to or prohibit said defendant's right to engage in interstate commerce within this State."

On appeal to the Court of Civil Appeals the judgment was affirmed, the court holding that the statutes were valid exercises of the police power of the State. It also held that the statute of 1889 was a condition of the permit of the Waters-Pierce Oil Company to do business in the State. A rehearing was denied. A writ of error to the Supreme Court of the State was denied, and the case was then brought here.

The assignments of error express in various ways the alleged discriminations of the statutes between persons and classes of persons, and the alleged deprivation of many persons of the right and liberty of contract, while permitting such right and liberty to others; the denial to foreign corporations of the right to do any business in the State, interstate or otherwise; the assumption by the State of the power to punish acts done out of the State, and authorizing a conviction of what are claimed to be criminal offences by a preponderance of proof.

Mr. George Clark and *Mr. John D. Johnson* for plaintiff in error. *Mr. D. C. Bolinger* was on their brief. *Mr. S. C. T. Dodd* filed a brief for same.

Mr. T. S. Smith for defendant in error. *Mr. M. M. Crane* and *Mr. T. A. Fuller* filed a brief for same.

MR. JUSTICE MCKENNA, after making the above statement, delivered the opinion of the court.

Transactions of interstate commerce were withdrawn from the consideration of the jury and were also excepted from the judgment. The transactions of local commerce which were held by the state courts, trial and appellate, to be violations of the statutes consisted in contracts with certain merchants by which the plaintiff in error required them to buy oils exclusively from it, "and from no other source;" or buy oils exclusively from it and not to sell to any person handling competing oils; or to buy exclusively from it and to sell at a price fixed by it.

The statutes must be considered in reference to these contracts. In any other aspect they are not subject to our review on this record, except the power of the state court to restrict their regulation to local commerce, upon which a contention is raised. It is based on the following provision:

"Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the district court of Travis County in the name of the State of Texas."

The claim is, if we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention *United States* v. *Reese*, 92 U. S. 214, 221; *Trade Mark Cases*, 100 U. S. 82; *United States* v. *Harris*, 106 U. S. 629; *Baldwin* v. *Franks*, 120 U. S. 678, and some other cases are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and the court finding the meaning of the statutes plain, decided that it could not be changed by construction even to save the statutes from unconstitutionality. This was but an exercise of judicial interpretation.

The courts of Texas have like power of interpretation of the

statutes of Texas. What they say the statutes of that State mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348; *St. Louis, Iron Mountain, &c., Railroad* v. *Paul*, 173 U. S. 404.

We may return therefore to the propositions which were submitted to the jury.

They have been broadly discussed, and considerations have been presented which transcend them, and relate to grievances which do not affect plaintiff in error. We are confined to its grievance. *Clark* v. *Kansas City*, 176 U. S. 114; *Tullis* v. *Lake Erie & Western Railroad*, 175 U. S. 348.

What is it? It is said that the statutes of Texas limit its right to make contracts and take away the property or liberty assured by the Fourteenth Amendment of the Constitution of the United States. Besides, it is asserted that the statutes make many discriminations, between persons and classes of persons, and able arguments are built upon their alleged injustice and oppression. We are not called upon to answer those arguments or to condemn or vindicate the statutes on this record.

The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court.

A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations.

Bank of Augusta v. *Earle*, 13 Pet. 519, involved the power of the Bank of Augusta, chartered by the State of Georgia, and invested by its charter with a function of dealing in bills of

exchange, to exercise that function in the State of Alabama. In passing on the question certain principles were declared which have never since been disturbed.

A contract of the corporation, it was declared, is the contract of the legal entity, and not of its individual members. Its rights are those given to it in that character, and not the rights which belong to its constituent citizens.

Its charter confers its powers and the means of executing them, and such powers and means can only be exercised in other States by the permission of the latter.

Chief Justice Taney said, delivering the opinion of the court, p. 587:

"The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court. In the case of *Head* v. *Providence Insurance Company*, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said: 'Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record.' In the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 636, the same principle was again decided by the court. 'A corporation,' said the court, 'is an artificial being, invisible, intangible and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the character of its creation confers upon it, either expressly or as incidental to its very existence.' And in the case of the *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, where the question in relation to the powers of corporations and their mode of action were very carefully considered, the court said: 'But whatever may be the implied powers of aggregate corporations,

by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute, must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself.' "

The power of the bank to deal in bills of exchange in the State of Alabama was sustained, but it was put upon the ground that neither the policy of the State nor its laws forbade it, and that the law of international comity which prevailed there sustained it.

In *Paul* v. *Virginia*, 8 Wall. 168, 181, the dependent and derivative rights of corporations were again declared. *Bank of Augusta* v. *Earle* was quoted from, and it was again decided that a corporation is the mere creation of local law, and can have no legal existence beyond the limits of the sovereignty where created, and the recognition of its existence in other States and the enforcement of its contracts made therein depend purely upon the comity of those States.

"Having no absolute right of recognition in other States, but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And it was also decided that a corporation did not have the rights of its personal members, and could not invoke that provision of section 2, article 4, of the Constitution of the United States, which gave to the citizens of each State the privileges and immunities of citizens of the several States. See also *Pembina Mining Co.* v. *Penn*, 125 U. S. 181; *Ducat* v. *Chicago*, 10 Wall. 410. And it has since been held in *Blake* v. *McClung*, 172 U. S. 239, and in *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, that the prohibitive words of the Fourteenth Amendment have no broader application in that respect.

In *Blake* v. *McClung*, a Virginia corporation was denied the

right to participate upon terms of equality with Tennessee creditors in the distribution of the assets of a British corporation in the hands of a Tennessee court.

In *Orient Insurance Co.* v. *Daggs*, the right of the company, a Connecticut corporation, to limit by contract its liability to the actual damages caused by fire, notwithstanding a provision in a statute of Missouri making the measure of damages in case of total loss the value of the property stated in the policy, was denied.

See also *Pembina Mining Co.* v. *Penn*, 125 U. S. 181.

In *Hooper* v. *California*, 155 U. S. 648, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the State. All preceding cases were cited, and it was assumed as settled "that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State." And the exception to the rule was stated to be "only cases where a corporation created by one State rests its right to enter another and engage in business therein upon the Federal nature of its business."

This exception was recognized in the case at bar and the business of the plaintiff in error of a Federal nature excluded from the operation of the judgment.

The pending case might be rested on *Hooper* v. *California*, simply as authority, and we have entered upon the reasoning upon which it was based, because its application to the contentions of the plaintiff in error is not properly estimated in the arguments of counsel.

Nor can the plaintiff in error claim an exemption from the principle on the ground that the permit of the company was a contract inviolable against subsequent legislation by the State. That contention was presented to the Court of Civil Appeals, and the court properly replied: "After the act of 1889 went into effect the State granted to appellant [plaintiff in error here] authority to engage in its business within the State for a

period of ten years. The act of 1889, as well as that of 1895, provides for the forfeiture of the permit of a foreign corporation which may violate any of the provisions of the statute. . . . The act in force when the appellant entered the State informed it that for a violation of its terms the permit to do business here would be forfeited. This provision of the law was as much a part of the obligation, and as binding upon the appellant, as if it had been expressly made part of the permit."

The statute of 1889, therefore, was a condition upon the plaintiff in error within the power of the State to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.

The statute was not repealed by the act of 1895. The only substantial addition made by the latter was to exclude from its provisions organizations of laborers, for the purpose of maintaining a standard of wages. The Court of Civil Appeals said of it, p. 18:

"If the clause in the act of 1895 which exempts from its operation labor organizations for the purpose of maintaining their wages would render that statute obnoxious to the Fourteenth Amendment to the Constitution, which we do not think the case, the entire act would be void, and could not operate as a repeal of the former law of 1889; and so that if it should be determined that this latter act was unconstitutional, the former act would be in force, and would not be subject to the objections urged against it, for the reasons stated by us in passing upon these objections, and therefore the State could maintain a case under this act."

In other words, as to that act the situation is this: It is either constitutional or unconstitutional. If it is constitutional, the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not affect the act of 1889, and that, as we have seen, imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the State to forfeiture.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.